IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

Supreme Court, U.S.
FILED
MAR 04 2004
OFFICE OF THE CLERK

(10)

NO. 03A540

JOHN PACE,

Petitioner,

v.

DONALD VAUGHN; OFFICE OF THE DISTRICT ATTORNEY OF PHILADELPHIA; ATTORNEY GENERAL OF PENNSYLVANIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BILLY H. NOLAS, ESQ.
Assistant Federal Defender
MAUREEN KEARNEY ROWLEY, ESQ.
Chief Federal Defender
Defender Association of Philadelphia
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

Counsel for Petitioner, John Pace

Dated: March 4, 2004

03-9627

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

NO. 03A540

JOHN PACE,

Petitioner,

v.

DONALD VAUGHN; OFFICE OF THE DISTRICT ATTORNEY OF PHILADELPHIA; ATTORNEY GENERAL OF PENNSYLVANIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BILLY H. NOLAS, ESQ.
Assistant Federal Defender
MAUREEN KEARNEY ROWLEY, ESQ.
Chief Federal Defender
Defender Association of Philadelphia
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

Counsel for Petitioner, John Pace

Dated: March 4, 2004

QUESTIONS PRESENTED

1. Should this Court grant the writ to resolve a conflict between the Courts of Appeal regarding an important question that this Court explicitly reserved in Artuz v. Bennett, 531 U.S. 4 (2000) – whether an untimely state post-conviction petition may be "properly filed" under § 2244(d)(2)?

2. Should this Court grant the writ to resolve a conflict between the Courts of Appeal regarding whether Carey v. Saffold, 536 U.S. 214 (2002) answered the question about "properly filed" that Artuz reserved?

3. Should this Court grant the writ to answer the question about "properly filed" which was reserved by Artuz and which the Third Circuit decided erroneously?

4. Should this Court grant the writ and review the Third Circuit's denial of equitable tolling, where the Third Circuit denies all federal habeas review to petitioners who act appropriately, reasonably and diligently, and as demanded by the exhaustion requirement, in seeking state court remedies?

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1
- State Court 1
- Federal District Court 9
- Third Circuit 12

REASONS FOR GRANTING THE WRIT 13

I. This Court should grant the writ to resolve a conflict between the Courts of Appeal regarding an important question that this Court explicitly reserved in Artuz v. Bennett, 531 U.S. 4 (2000) – whether an untimely state post-conviction petition may be "properly filed" under § 2244(d)(2). 13

- A. The Second, Fifth, Ninth and Eleventh Circuits hold that untimely state post-conviction proceedings can be "properly filed" under § 2244(d)(2). 14
- B. The Third and Seventh Circuits hold that all untimely state post-conviction proceedings are per se not "properly filed" under § 2244(d)(2). 17

II. This Court should grant the writ to resolve a conflict between the Courts of Appeal regarding whether Carey v. Saffold, 536 U.S. 214 (2002), answered the question about "properly filed" that was reserved in Artuz. 18

- A. The Third and Seventh Circuits erroneously believe that Saffold decided the "properly filed" issue that Artuz reserved. 19
- B. The Second, Fifth, Ninth and Eleventh Circuits recognize that Saffold did not decide the "properly filed" issue that Artuz reserved. 21

III. This Court should grant the writ because the Third Circuit erred in its resolution of the important issue that this Court reserved in Artuz. 23

- A. The Third Circuit defines "properly filed" in a way that was rejected by Artuz, and that is inconsistent with this Court's precedent regarding the importance of habeas corpus 23
- B. Under Artuz's analysis, a PCRA petition that is ultimately deemed untimely by the state courts is "properly filed" under § 2244(d)(2). 25

IV. This Court should grant the writ and review the Third Circuit's denial of equitable tolling, which denies all federal habeas review to petitioners who act "appropriately," "reasonably" and "diligently," and as demanded by the exhaustion requirement, in seeking state court remedies. 27

CONCLUSION 34

TABLE OF AUTHORITIES

FEDERAL CASES

Artuz v. Bennett, 531 U.S. 4 (2000) ..... 9, passim

Austin v. Larsen, 2003 WL 21378598 (9th Cir. June 11, 2003) 22

Baker v. Horn, 210 F.Supp.2d 592 (E.D. Pa. 2002) 31

Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) 33

Banks v. Horn, 271 F.3d 527 (3d Cir. 2001) 6, 8

Belle v. Stepanik, 1996 WL 663872 (E.D. Pa. Nov. 14, 1996) 3, 30

Blasi v. Attorney General, 30 F.Supp.2d 481 (E.D. Pa. 1998) 30

Brooks v. Walls, 301 F.3d 839 (7th Cir. 2002) ..... 14, passim

Burnett v. New York Central R. Co., 380 U.S. 424 (1965) 29

Carey v. Saffold, 536 U.S. 214 (2002) ..... 16, passim

Castro v. United States, 124 S. Ct. 786 (2003) 32

Christy v. Horn, 115 F.3d 201 (3d Cir. 1997) 31

Clymore v. United States, 217 F.3d 370 (5th Cir. 2000) 29

Crawley v. Horn, 7 F.Supp.2d 587 (E.D. Pa. 1998) 3, 30, 31

Cummings v. Love, 1994 WL 164122 (E.D. Pa. May 3, 1994) 3

Dictado v. Ducharme, 189 F.3d 889 (9th Cir. 1999) 16

Dictado v. Ducharme, 244 F.3d 724 (9th Cir. 2001) ..... 9, passim

Doctor v. Walters, 96 F.3d 675 (3d Cir. 1996) 3, 29, 30

Doherty v. Teamsters Pension Trust Fund, 16 F.3d 1386 (3d Cir. 1994) 29

Emerson v. Johnson, 243 F.3d 931 (5th Cir. 2001) 13, 15

Estelle v. Gamble, 429 U.S. 97 (1976) 32

Fahy v. Horn, 240 F.3d 239 (3d Cir. 2001) 11, 17, 23

Gray v. Phillips Petroleum Co., 858 F.2d 610 (10th Cir. 1988) 33

Hammock v. Vaughn, 1998 WL 163194 (E.D. Pa. Apr. 7, 1998) 3, 30

Hart v. J.T. Baker Chemical Co., 598 F.2d 829 (3d Cir. 1979) 32

Hull v. Kyler, 190 F.3d 88 (3d Cir. 1999) 3

Husch v. Szabo Food Service Co., 851 F.2d 999 (7th Cir. 1988) 29

Jenkins v. Johnson, 330 F.3d 1146 (9th Cir. 2003) 21, 22

Joseph Bancroft & Sons Co. v. Shelley Knitting Mills, Inc., 268 F.2d 569 (3d Cir. 1959) 32

Kocian v. Getty Refining & Marketing Co., 707 F.2d 748 (3d Cir. 1983) 32

Lambert v. Blackwell, 134 F.3d 506 (3d Cir. 1998) 3, 6, 30

Lee v. Kemna, 534 U.S. 362 (2002) 24

Lonchar v. Thomas, 517 U.S. 314 (1996) 24, 33

Lovasz v. Vaughn, 134 F.3d 148 (3d Cir. 1998) 25, 29

Merritt v. Blaine, 326 F.3d 159 (3d Cir. 2003) ..... 12, passim

Miklavic v. USAir, Inc., 21 F.3d 551 (3d Cir. 1994) 33

Miller v. Beneficial Management Corp., 977 F.2d 834 (3d Cir. 1992) 33

Morris v. Horn, 1998 WL 150956 (E.D. Pa. March 19, 1998) 30

Nara v. Frank, 264 F.3d 310 (3d Cir. 2001) 18

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 31

Peterkin v. Horn, 30 F.Supp.2d 513 (E.D. Pa. 1998) 30

Peterson v. Brennan, 1998 WL 470139 (E.D. Pa. Aug. 11, 1998) 30

Phillips v. Vaughn, 2003 WL 202472 (3d Cir. Jan. 29, 2003) 18

Robertson v. Cain, 324 F.3d 297 (5th Cir. 2003) 22

Robinson v. Ricks, 163 F.Supp.2d 155 (E.D.N.Y. 2001) 16

Robinson v. Ricks, 2003 WL 174628 (2d Cir. Jan. 22, 2003) 14, 16, 22

Saffold v. Carey, 312 F.3d 1031 (9th Cir. 2003) 21

Saffold v. Newland, 250 F.3d 1262 (9th Cir. 2001) 20, 21

Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003) ..... 14, passim

Slack v. McDaniel, 529 U.S. 473 (2000) 24, 33

Smith v. Ward, 209 F.3d 383 (5th Cir. 2000) ..... 9, passim

Solem v. Helm, 463 U.S. 277 (1983) 32

Sutton v. Vaughn, 741 F. Supp. 564 (E.D. Pa. 1990) 3

Szuchon v. Lehman, 273 F.3d 299 (3d Cir. 2001) 6

United States v. Miller, 197 F.3d 644 (3d Cir. 1999) 32

Weakland v. White, 1997 WL 799433 (E.D. Pa. Dec. 29, 1997) 30

Williams v. Vaughn, 1998 WL 238466 (E.D. Pa. May 8, 1998) 31

Williams v. Vaughn, 3 F.Supp.2d 567 (E.D. Pa. 1998) 30

Yoshisato v. Terhune, 2003 WL 21153486 (9th Cir. May 16, 2003) 22

Young v. United States, 535 U.S. 43 (2002) 29

STATE CASES

Commonwealth v. Abdul-Salaam, 812 A.2d 497 (Pa. 2002) 27

Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998) 3

Commonwealth v. Alcorn, 703 A.2d 1054 (Pa. Super. 1997) ..... 5, passim

Commonwealth v. Anderson, 643 A.2d 109 (Pa. Super. 1994) 3

Commonwealth v. Austin, 721 A.2d 375 (Pa. Super. 1998) 7, 26

Commonwealth v. Banks, 726 A.2d 374 (Pa. 1999) 6

Commonwealth v. Barrett, 761 A.2d 145 (Pa. Super. 2000) 7

Commonwealth v. Bazemore, 614 A.2d 684 (Pa. 1992) 3

Commonwealth v. Beasley, 741 A.2d 1258 (Pa. 2000) 8, 25, 27

Commonwealth v. Campbell, 505 A.2d 262 (Pa. Super. 1986) 4

Commonwealth v. Camps, 772 A.2d 70 (Pa. Super. 2001) 7

Commonwealth v. Carbone, 707 A.2d 1145 (Pa. Super. 1998) 3

Commonwealth v. Carr, 543 A.2d 1232 (Pa. Super. 1988) 4

Commonwealth v. Carr, 768 A.2d 1164 (Pa. Super. 2001) 7

Commonwealth v. Conway, 706 A.2d 1243 (Pa. Super. 1997) ..... 3, passim

Commonwealth v. Cross, 726 A.2d 333 (Pa. 1999) 27

Commonwealth v. DeHart, 730 A.2d 991 (Pa. Super. 1999) 7

Commonwealth v. DiVentura, 734 A.2d 397 (Pa. Super. 1999) 7

Commonwealth v. Duffey, 713 A.2d 63 (Pa. 1998) 33

Commonwealth v. Ferguson, 722 A.2d 177 (Pa. Super. 1998) 26

Commonwealth v. Ford, 461 A.2d 1281 (Pa. Super. 1983) 4

Commonwealth v. Green, 593 A.2d 899 (Pa. Super. 1991) 4

Commonwealth v. Guthrie, 749 A.2d 502 (Pa. Super. 2000) 26

Commonwealth v. Hall, 713 A.2d 650 (Pa. Super. 1998) 5

Commonwealth v. Holland, 727 A.2d 563 (Pa. 1999) 3

Commonwealth v. Holloway, 739 A.2d 1039 (Pa. 1999) 3

Commonwealth v. Howard, 540 A.2d 960 (Pa. Super. 1988) 4

Commonwealth v. Howard, 719 A.2d 233 (Pa. 1998) 3

Commonwealth v. Hoyman, 561 A.2d 756 (Pa. Super. 1989) 3

Commonwealth v. Huffman, 638 A.2d 961 (Pa. 1994) 3

Commonwealth v. Hutchins, 760 A.2d 50 (Pa. Super. 2000) 7

Commonwealth v. Irving, 500 A.2d 868 (Pa. Super. 1985) 4

Commonwealth v. Johnson, 669 A.2d 315 (Pa. 1995) 3

Commonwealth v. Lambert, 765 A.2d 306 (Pa. Super. 2000) 6

Commonwealth v. Lark, 746 A.2d 585 (Pa. 2000) 27

Commonwealth v. Lawson, 549 A.2d 107 (Pa. 1988) 3

Commonwealth v. Little, 716 A.2d 1287 (Pa. Super. 1998) 5

Commonwealth v. Lusch, 759 A.2d 6 (Pa. Super. 2000) 7

Commonwealth v. McFadden, 587 A.2d 740 (Pa. Super. 1991) 3

Commonwealth v. Mitchell, 465 A.2d 1284 (Pa. Super. 1983) 4

Commonwealth v. Morales, 701 A.2d 516 (Pa. 1997) 3

Commonwealth v. Morris, 822 A.2d 684 (Pa. 2003) 27

Commonwealth v. Moss, 689 A.2d 259 (Pa. Super. 1997) 3

Commonwealth v. Neidig, 489 A.2d 921 (Pa. Super. 1985) 4

Commonwealth v. Norris, 446 A.2d 246 (Pa. 1982) 3

Commonwealth v. O'Neil, 573 A.2d 1112 (Pa. Super. 1990) 4

Commonwealth v. Padden, 483 A.2d 950 (Pa. Super. 1984) 4

Commonwealth v. Palmer, 814 A.2d 700 33

Commonwealth v. Perez, 799 A.2d 848 (Pa. Super. 2002) 26

Commonwealth v. Perry, 716 A.2d 1259 (Pa. Super. 1998) 7, 25

Commonwealth v. Porter, 728 A.2d 890 (Pa. 1999) 3

Commonwealth v. Pursell, 724 A.2d 293 (Pa. 1999) 3

Commonwealth v. Quinlan, 639 A.2d 1235 (Pa. Super. 1994) 3

Commonwealth v. Roman, 730 A.2d 486 (Pa. Super. 1999) 7

Commonwealth v. Romansky, 702 A.2d 1064 (Pa. Super. 1997) 3

Commonwealth v. Ryan, 575 A.2d 949 (Pa. Super. 1990) 3, 7

Commonwealth v. Santiago, 591 A.2d 1095 (Pa. Super. 1991) 3

Commonwealth v. Shannon, 608 A.2d 1020 (Pa. 1992) 3

Commonwealth v. Smith, 598 A.2d 268 (Pa. 1991) 3

Commonwealth v. Smith, 818 A.2d 494 (Pa. 2003) 26, 32, 33

Commonwealth v. Vasquez, 744 A.2d 1280 (Pa. 2000) 3

Commonwealth v. Walker, 362 A.2d 227 (Pa. 1976) 3

Commonwealth v. Weimer, 756 A.2d 684 (Pa. Super. 2000) 7

Commonwealth v. Welch, 435 A.2d 189 (Pa. Super. 1981) 4

Commonwealth v. Williams, 660 A.2d 614 (Pa. Super. 1995) 3

Commonwealth v. Yarris, 731 A.2d 581 (Pa. 1999) 8

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2244(d) ..... 1, passim

STATE STATUTES

42 Pa. C.S. § 9541 2

42 Pa. C.S. § 9545(b) ..... 2, passim

42 Pa. C.S. § 9545(a) 25

La.Code Crim. P. art. 930.8A 15

Wa.Rev.Code §§ 10.73.90, 10.73.100 15

TREATISES, ARTICLES AND BRIEFS

Louis Natali, Jr., New Bars in Pennsylvania Capital Post-Conviction Law and Their Implications for Federal Habeas Corpus Review, 73 Temple L. Rev. 69, 87 (2000) 3, 4

Newland v. Saffold, Brief of the States of North Carolina, et al., as Amici Curiae, 2001 WL 1548793 (U.S. Nov. 29, 2001) 21

Thomas Place, The Claim Is Cognizable but the Petition Is Untimely: The Pennsylvania Supreme Court's Recent Collateral Relief Decisions, 10 Temp. Pol. & Civ. Rts. L 4, 6

Standard Pennsylvania Practice 2d §§ 13.11, 13:93 (West 2002) 8

Petitioner, John Pace, respectfully asks that the Court issue its writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, Pace v. Vaughn, 2003 WL 21754982 (3d Cir. July 30, 2003) ("Pace-3"), is appended as Exhibit A. The Third Circuit's October 6, 2003 order denying en banc rehearing is appended as Exhibit B. The opinions of the United States District Court for the Eastern District of Pennsylvania, Pace v. Vaughn, 151 F.Supp.2d 586 (E.D. Pa. 2001) ("Pace-1") and Pace v. Vaughn, 2002 WL 485689 (E.D. Pa. March 29, 2002) ("Pace-2"), are appended as Exhibits C and D, respectively.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Third Circuit denied en banc rehearing on October 6, 2003. This Court granted Petitioner an extension of time until March 4, 2004 in which to file this petition (see Exhibit E).

STATUTORY PROVISIONS INVOLVED

This case involves the one year statute of limitations in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which states, in pertinent part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. ...
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1)-(2).

STATEMENT OF THE CASE

State Court: In 1986, Petitioner, then just 17 years old, pled guilty to second-degree murder in the Philadelphia, Pennsylvania, Court of Common Pleas. His lawyer did not appeal. Petitioner

---

[1] All emphasis herein is supplied unless otherwise indicated. Respondents are referred to as "the Commonwealth."

later learned that his lawyer had given him grossly erroneous information about the sentence he would get – he was told he would serve 10-to-15 years when, in fact, the mandatory sentence was life without parole. Petitioner therefore sought state post-conviction relief, which was denied in 1992.

On November 27, 1996, Petitioner filed in the Philadelphia Court of Common Pleas a pro se petition under Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa. C.S. §§ 9541 et seq., again seeking state post-conviction relief. The significance of this PCRA filing can only be understood within the context of Pennsylvania post-conviction law at the time of that filing. We therefore describe that law.

On January 16, 1996, Pennsylvania's legislature amended the PCRA and, for the first time, added time limits. Under the new time limits, a PCRA petition is timely if filed within one year of when the conviction became final, 42 Pa. C.S. § 9545(b)(1); a PCRA claim filed outside this one year period is timely if failure to earlier raise the claim resulted from interference by governmental officials, if the claim is based on newly discovered facts, or if the claim is based on a new rule of constitutional law, § 9545(b)(1)(i)-(iii). Under the statutory language, claims based on these three exceptions to the one year period must be filed within 60 days of the date on which the governmental interference ended, the new facts were discovered, or the new rule of constitutional law became applicable. 42 Pa. C.S. § 9545(b)(2).

Petitioner's conviction became final in 1986, when trial counsel failed to file a direct appeal. Thus, under the statutory language of the 1996 PCRA amendments, Petitioner's PCRA claims were time-barred in 1987 (nine years before the time-bar was first added to the PCRA), unless those claims satisfied an exception in § 9545(b).

Pennsylvania caselaw at the time of Petitioner's November 1996 filing, however, strongly suggested that his claims would be considered on their merits even if they did not satisfy any statutory exception to the PCRA's one year time limit. When Petitioner filed his PCRA petition, in

November 1996, Pennsylvania's courts did not treat the PCRA's statutory bar rules as the last word. Instead, Pennsylvania's courts had developed a large body of caselaw establishing ways in which the PCRA's statutory bar rules would be overcome, requiring merits review of claims that seemingly were barred by the PCRA's statutory language. In particular, Pennsylvania's courts required merits review of claims that were barred by the PCRA's statutory bar rules when: (1) failure to raise the claim earlier was caused by ineffective assistance of prior counsel (including prior post-conviction counsel);[2] (2) failure to address the merits of the claim could result in a "miscarriage of justice";[3] or (3) the claim challenged the legality of the sentence.[4] See also Louis Natali, Jr., New Bars in

[2] E.g., Lambert v. Blackwell, 134 F.3d 506, 522 n.27 (3d Cir. 1998) ("[T]he Commonwealth acknowledged in its letter brief ... Pennsylvania decisional law holding that 'PCRA courts will consider claims which otherwise would be deemed waived when raised under the rubric of ineffective assistance of counsel'"); Commonwealth v. Holloway, 739 A.2d 1039, 1044 (Pa. 1999); Commonwealth v. Porter, 728 A.2d 890, 895 n.3 (Pa. 1999); Commonwealth v. Holland, 727 A.2d 563, 565 (Pa. 1999); Commonwealth v. Pursell, 724 A.2d 293, 303 (Pa. 1999); Commonwealth v. Albrecht, 720 A.2d 693, 699-700 (Pa. 1998); Commonwealth v. Howard, 719 A.2d 233, 236 n.2 (Pa. 1998); Commonwealth v. Morales, 701 A.2d 516, 520 (Pa. 1997); Commonwealth v. Carbone, 707 A.2d 1145, 1150 (Pa. Super. 1998).

[3] E.g., Hull v. Kyler, 190 F.3d 88, 101 n.4 (3d Cir. 1999); Lambert, 134 F.3d at 520-21; Doctor v. Walters, 96 F.3d 675, 682-83 (3d Cir. 1996); Commonwealth v. Lawson, 549 A.2d 107, 112 (Pa. 1988); Commonwealth v. Huffman, 638 A.2d 961, 963 (Pa. 1994); Commonwealth v. Bazemore, 614 A.2d 684, 685, 687 (Pa. 1992); Commonwealth v. Romansky, 702 A.2d 1064, 1065-67 (Pa. Super. 1997); Commonwealth v. Williams, 660 A.2d 614, 619 (Pa. Super. 1995); Commonwealth v. Santiago, 591 A.2d 1095, 1114-17 (Pa. Super. 1991); Commonwealth v. McFadden, 587 A.2d 740, 742, 744 (Pa. Super. 1991); Commonwealth v. Ryan, 575 A.2d 949, 951 (Pa. Super. 1990); Commonwealth v. Hoyman, 561 A.2d 756, 758-59 (Pa. Super. 1989); Crawley v. Horn, 7 F.Supp.2d 587 (E.D. Pa. 1998); Sutton v. Vaughn, 741 F.Supp. 564, 566 (E.D. Pa. 1990); Hammock v. Vaughn, 1998 WL 163194, *1, *5 (E.D. Pa. Apr. 7, 1998); Belle v. Stepanik, 1996 WL 663872, *6-*7 (E.D. Pa. Nov. 14, 1996); Cummings v. Love, 1994 WL 164122, *3-*4 (E.D. Pa. May 3, 1994); see also Commonwealth v. Conway, 706 A.2d 1243, 1244 (Pa. Super. 1997) (assuming that challenge to legality of sentence trumps PCRA time-bar).

[4] E.g., Commonwealth v. Vasquez, 744 A.2d 1280, 1284 (Pa. 2000); Commonwealth v. Johnson, 669 A.2d 315, 321 (Pa. 1995); Commonwealth v. Shannon, 608 A.2d 1020, 1024 (Pa. 1992); Commonwealth v. Smith, 598 A.2d 268, 270 (Pa. 1991); Commonwealth v. Norris, 446 A.2d 246, 251 n.9 (Pa. 1982); Commonwealth v. Walker, 362 A.2d 227, 230 (Pa. 1976); Commonwealth v. Moss, 689 A.2d 259, 262 (Pa. Super. 1997); Williams, 660 A.2d at 618; Commonwealth v. Anderson, 643 A.2d 109, 111 (Pa. Super. 1994); Commonwealth v. Quinlan, 639 A.2d 1235, 1238

Pennsylvania Capital Post-Conviction Law and Their Implications for Federal Habeas Corpus Review, 73 TEMPLE L. REV. 69, 87 (2000) (hereinafter "*New Bars*") (discussing these bar-overcoming rules); Thomas Place, The Claim Is Cognizable but the Petition Is Untimely: The Pennsylvania Supreme Court's Recent Collateral Relief Decisions, 10 TEMP. POL. & CIV. RTS. L. REV. 49, 72-75 (2000) (hereinafter "*Claim Is Cognizable*") (discussing ineffective assistance of counsel and illegality of sentence bar-overcoming rules).

These long-established bar-overcoming rules (ineffective assistance of counsel, illegality of sentence, miscarriage of justice) had "no statutory basis" in the PCRA or any other statute. *New Bars* at 99. Instead, "[t]hey [we]re entirely court-made, and they were consistently used to afford merits review to claims for which such review was foreclosed by the PCRA's statutory language." Id. Because these bar-trumping rules were court-made, not statutory, and were used to overcome statutory bar rules, Pennsylvania prisoners could reasonably expect these court-made anti-bar rules to apply to the post-1996 PCRA, just as they applied to the pre-1996 PCRA, until a definitive state court ruling held that these anti-bar rules would no longer be applied. Id. at 100-01. In particular, it was reasonable to believe that these court-made anti-bar rules would be applied to the PCRA's new time limits – i.e., claims that were untimely under the PCRA's statutory language would still be afforded merits review if the petitioner asserted ineffective assistance of prior counsel, illegality of sentence and/or miscarriage of justice. Id. at 100-01. Unless and until the state courts abandoned these court-made rules, Pennsylvania prisoners reasonably expected they would trump the PCRA time-bar, just as they trumped other statutory PCRA bar rules.

(Pa. Super. 1994); Commonwealth v. Green, 593 A.2d 899, 900 n.1 (Pa. Super. 1991); Commonwealth v. O'Neil, 573 A.2d 1112, 1114 (Pa. Super. 1990); Commonwealth v. Carr, 543 A.2d 1232, 1234 (Pa. Super. 1988); Commonwealth v. Howard, 540 A.2d 960, 961 (Pa. Super. 1988); Commonwealth v. Campbell, 505 A.2d 262, 265 (Pa. Super. 1986); Commonwealth v. Irving, 500 A.2d 868, 872 (Pa. Super. 1985); Commonwealth v. Neidig, 489 A.2d 921, 924-25 (Pa. Super. 1985); Commonwealth v. Padden, 483 A.2d 950, 951 (Pa. Super. 1984); Commonwealth v. Mitchell, 465 A.2d 1284, 1287-88 (Pa. Super. 1983); Commonwealth v. Ford, 461 A.2d 1281, 1289 (Pa. Super. 1983); Commonwealth v. Welch, 435 A.2d 189, 189 (Pa. Super. 1981).

Pennsylvania's courts did not clearly abandon these traditional bar-overcoming rules until long after Petitioner filed his November 1996 PCRA petition. Pennsylvania appellate courts first addressed the PCRA time limits on December 17, 1997, over a year after Petitioner filed his PCRA petition, when two Superior Court panels held PCRA claims time-barred. See Commonwealth v. Alcorn, 703 A.2d 1054 (Pa. Super. 1997); Commonwealth v. Conway, 706 A.2d 1243 (Pa. Super. 1997).[5] These decisions, however, did not clearly abandon the traditional court-made bar-overcoming rules. If anything, they suggested that the new PCRA time-bar would be overcome by the court-made anti-bar rules, as were other statutory bars.[6]

Alcorn did not address the bar-overcoming issue at all – there is no suggestion in Alcorn that the petitioner raised the argument or asserted an anti-bar rule. Conway found the petitioner's claim untimely under the PCRA's statutory language but went on to "assume that [the claim] constitutes a non-waivable challenge to the legality of the sentence," which trumped the PCRA time-bar. Id., 706 A.2d at 1244. Conway then addressed the claim on its merits. Id. Thus, Conway suggested that traditional anti-bar rules (there, a challenge to the legality of the sentence) would trump the PCRA time-bar just as they trumped other statutory bars.[7]

Subsequent Superior Court decisions, in June and September 1998, further suggested that the court-made anti-bar rules would continue to trump the PCRA's statutory bars. In Commonwealth v. Hall, 713 A.2d 650, 651 (Pa. Super. 1998), the court "avoided" a "decision on the constitutionality of" the PCRA time limits by addressing time-barred claims on their merits. In Commonwealth v. Little, 716 A.2d 1287, 1289 (Pa. Super. 1998), the court held that the "prisoner mailbox rule" applies to PCRA filing times, and rejected the Commonwealth's argument that only

---

[5] In both Alcorn and Conway, the lower court did not apply the time-bar, reflecting the uncertain state of Pennsylvania law at the time.

[6] Moreover, as decisions of Pennsylvania's intermediate appellate court, they could not make clear that the traditional anti-bar rules were abandoned; only the Pennsylvania Supreme Court could.

[7] Conway did not discuss miscarriage of justice or ineffective assistance of prior counsel.

the exceptions to filing times set forth in the PCRA statute should apply. Hall and Little thus suggested that Pennsylvania's courts would apply the new time-bar just as they applied other PCRA statutory bar rules – in a flexible way where court-made rules could trump the statute and allow merits review.

This uncertainty in state law was not clarified until, at the earliest, the Pennsylvania Supreme Court decided Commonwealth v. Banks, 726 A.2d 374 (Pa. 1999), in March 1999, and "held that the one-year period for filing under the PCRA is jurisdictional, and the only cognizable exceptions are those enumerated in the statute." Szuchon v. Lehman, 273 F.3d 299, 323 n.14 (3d Cir. 2001).[8] This clarification, however, came long after Petitioner's November 1996 PCRA filing.

It was in this unclear state law context that Petitioner filed his November 1996 PCRA petition. At the time of that filing, it appeared that the state courts' traditional bar-overcoming rules (miscarriage of justice, ineffective assistance of counsel, illegality of sentence) would trump the PCRA time-bar. In accord with what appeared to be state law at the time, Petitioner alleged in his PCRA petition that his claims met all of the court-made bar-overcoming rules. He alleged, inter alia, that: "the imposition of a life sentence without eligibility for parole was illegal; his guilty plea was entered involuntarily; and, that all counsel were ineffective, resulting in a miscarriage of justice."

[8] See also Commonwealth v. Lambert, 765 A.2d 306, 322-23 (Pa. Super. 2000) (before August 1999 decision in Commonwealth v. Fahy, 737 A.2d 214 (Pa. 1999), prisoners reasonably believed PCRA time-bar was subject to exceptions other than those set forth in statute); *Claim is Cognizable* at 74 (Pennsylvania Supreme Court's decision in "Fahy [August 1999] ignores settled precedent" regarding the "illegal sentence" and "ineffective assistance of counsel" bar-overcoming rules); id. at 81 ("Neither the language, structure, nor legislative history of the [PCRA's time-bar] ... suggest that the legislature intended the filing period to act as a jurisdictional bar."); id. at 69-71 (same); id. at 71 (even if the Pennsylvania Supreme Court was correct to deem the time limits "jurisdictional," it ignored "a substantial body of case law in Pennsylvania holding that time limits that are jurisdictional are subject to equitable exceptions"); Banks v. Horn, 271 F.3d 527, 534 (3d Cir. 2001) (before Pennsylvania Supreme Court's 1999 Banks decision, petitioners "could reasonably have viewed the state time limit as a mere statute of limitations ..., not ... a jurisdictional requirement"); Lambert, 134 F.3d at 522 (referring to PCRA time limits as "statute of limitations").

Commonwealth v. Pace, No. 3642 Philadelphia 1997, slip op. at 3 (Pa. Super. Dec. 3, 1998).[9] At that time, there was no state court opinion rejecting application of these court-made rules, and it was reasonable to believe they still applied, as they always had, and would trump the PCRA time-bar just as they trumped statutory bars in the pre-amendment PCRA.

The Court of Common Pleas' treatment of Petitioner's November 1996 PCRA petition is consistent with these long-established state court anti-bar rules. The Court of Common Pleas did not deem Petitioner's PCRA claims untimely. Instead, it appointed counsel to represent Petitioner, allowed appointed counsel to amend and brief the PCRA claims, and ruled on the merits. The Court of Common Pleas denied PCRA relief on June 23, 1997, without ever even mentioning the PCRA time limits.[10]

After the Court of Common Pleas denied relief, appointed counsel withdrew and Petitioner

[9] In addition to Petitioner's explicit statement of the three bar-overcoming rules (ineffective assistance of counsel, illegality of sentence, miscarriage of justice), his allegation that "his guilty plea was entered involuntarily" also falls within Pennsylvania's "miscarriage of justice" exception to bar. See Ryan, 575 A.2d at 950-51.

[10] Similarly, in many other PCRA cases filed around the same time as Petitioner's the state courts ruled on the merits of facially time-barred PCRA claims. E.g., Commonwealth v. Roman, 730 A.2d 486, 487 (Pa. Super. 1999) (common pleas court held hearing and granted relief on untimely PCRA petition, filed in October 1997); Commonwealth v. Camps, 772 A.2d 70, 72 (Pa. Super. 2001) (common pleas court appointed counsel and ruled on merits of untimely PCRA petition, filed in January 1999); Commonwealth v. Hutchins, 760 A.2d 50, 52 (Pa. Super. 2000) (common pleas court held hearing and ruled on merits of untimely PCRA petition, filed in March 1998); Commonwealth v. Weimer, 756 A.2d 684, 685 (Pa. Super. 2000) (common pleas court ruled on merits of untimely PCRA petition, filed in May 1998); Commonwealth v. DiVentura, 734 A.2d 397, 398 (Pa. Super. 1999) (same for petition filed in October 1998); Commonwealth v. DeHart, 730 A.2d 991, 992 (Pa. Super. 1999) (same for petition filed in January 1997); Commonwealth v. Austin, 721 A.2d 375, 377 (Pa. Super. 1998) (same); Commonwealth v. Perry, 716 A.2d 1259, 1260-61 (Pa. Super. 1998) (same for petition filed in December 1996); Commonwealth v. Alcorn, 703 A.2d 1054, 1055-56 (Pa. Super. 1997) (same for petition filed in September 1996); Commonwealth v. Conway, 706 A.2d 1243, 1244 (Pa. Super. 1997) (same for petition filed on January 17, 1996); see also Commonwealth v. Carr, 768 A.2d 1164, 1166 (Pa. Super. 2001) (common pleas court denied PCRA petition as untimely only after appointing counsel and allowing counsel to amend); Commonwealth v. Barrett, 761 A.2d 145, 146 (Pa. Super. 2000) (same); Commonwealth v. Lusch, 759 A.2d 6, 8 (Pa. Super. 2000) (same).

appealed, pro se, to the Superior Court. Several months after Petitioner filed his notice of appeal, other Superior Court panels issued the Alcorn and Conway decisions (discussed above), the first decisions discussing the PCRA time-bar. The Commonwealth then filed a letter brief in the Pace Superior Court, asserting that Alcorn required dismissal of Petitioner's claims. On December 4, 1998, the Pace Superior Court, citing Alcorn, dismissed Petitioner's claims as untimely. The Court did not address Petitioner's anti-bar arguments (miscarriage of justice, ineffective assistance of counsel, illegality of sentence).

In response to the Superior Court's dismissal, Petitioner filed an *Application for Reargument*, in which he pointed out that the Superior Court had overlooked his anti-bar arguments and asked the Court to reconsider because, as he had pointed out in his original Superior Court brief, those anti-bar arguments should overcome any statutory bar, including the time-bar. At the same time, Petitioner also invoked the statutory "governmental interference" exception to the PCRA time-bar, 42 Pa. C.S. § 9545(b)(1)(i), explaining that prison officials had seized his legal documents, thus preventing him from filing earlier. See Pace-1 at 590; Pace-2 at *2.[11] On February 8, 1999, the Superior Court

[11] In the Third Circuit, the Commonwealth criticized Petitioner for first invoking "governmental interference" in his Superior Court reargument. The Commonwealth's critique is unfounded. When Petitioner filed his PCRA petition in the Court of Common Pleas it was reasonable to believe that the time limits were trumped by court-made anti-bar rules, and that they were an ordinary statute of limitations, and thus waived if not raised by the Commonwealth. See Banks, 271 F.3d at 534. The Commonwealth did not raise the time-bar in the Court of Common Pleas and that court did not rely on it in denying relief. Thus, there was no reason for Petitioner to address it in the Court of Common Pleas. Similarly, Petitioner had no reason to anticipate the time-bar in Superior Court, since the Commonwealth did not raise it below and the lower court did not rely on it. Under these circumstances, a limitations defense is usually waived. See 2 Standard Pennsylvania Practice 2d §§ 13.11, 13:93 (West 2002). The Superior Court's decision was the first time the time-bar was applied to Petitioner. His reargument application was his first opportunity to address it. Arguments against the PCRA time-bar are not waived under such circumstances. Commonwealth v. Beasley, 741 A.2d 1258, 1261 (Pa. 2000) ("Appellant does not discuss in his brief the issue of timeliness ... However, since Peterkin [decided in December 1998] was the first decision of this court interpreting the new amendments to the PCRA, and since appellant's PCRA petition and his brief to this court were both filed prior to that decision, we have, in the interest of fairness, reviewed the numerous issues set forth in appellant's brief in an effort to ascertain whether any of those issues arguably fit within one or more of the exceptions"); Commonwealth v. Yarris, 731 A.2d

denied reargument without comment. Petitioner sought discretionary review in the Pennsylvania Supreme Court, which was denied on July 29, 1999.

Federal District Court: On December 22, 1999, Petitioner, still pro se, filed a habeas petition in the United States District Court for the Eastern District of Pennsylvania (Chief Judge James T. Giles). The Commonwealth asserted that the habeas petition was untimely under AEDPA because, the Commonwealth claimed, Petitioner's PCRA petition did not toll AEDPA's one year statute of limitations. It is undisputed that the habeas petition is timely if the PCRA petition tolled AEDPA's limitations period.

The District Court rejected the Commonwealth's AEDPA time-bar arguments, finding both statutory tolling under 28 U.S.C. § 2244(d)(2) (tolling during "properly filed" state post-conviction proceedings), and equitable tolling. Pace v. Vaughn, 151 F.Supp.2d 586 (E.D. Pa. 2001) ("Pace-1"). The Commonwealth moved for reconsideration or permission to appeal. The District Court then appointed undersigned counsel to represent Petitioner. After further briefing and argument, the District Court denied the Commonwealth's motion for reconsideration, but allowed an appeal. Pace v. Vaughn, 2002 WL 485689 (E.D. Pa. March 29, 2002) ("Pace-2").

The District Court found statutory tolling under § 2244(d)(2) because the PCRA petition was "properly filed" as that term is interpreted by this Court, in Artuz v. Bennett, 531 U.S. 4 (2000), and by the Fifth and Ninth Circuits applying Artuz in similar situations, Smith v. Ward, 209 F.3d 383 (5th Cir. 2000); Dictado v. Ducharme, 244 F.3d 724 (9th Cir. 2001). See Pace-2 at *5-*8.

The District Court recognized that Artuz "specifically left open the question" presented here – whether an untimely state post-conviction petition may be "properly filed" under § 2244(d)(2). Pace-2 at *5. The District Court found, however, that Artuz's analysis shows that an untimely PCRA petition is "properly filed." Id. In Artuz, this Court found a state post-conviction petition

581, 587 (Pa. 1999) (reviewing to see if any claim meets statutory exception, where "[n]either the parties nor the lower courts have discussed the timeliness of Appellant's second [PCRA] petition").

"properly filed" when all of its claims were procedurally barred under state law: the "question whether an application has been properly filed is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." Pace-2 at *5 (quoting Artuz at 9). In addressing the "properly filed" issue, "Artuz distinguishe[d] between state [post-conviction] statutes ... which set forth 'a condition to filing' as opposed to 'a condition to obtaining relief.'" Pace-2 at *5 (quoting Artuz at 11). Under Artuz, state court applications that violate a "condition to filing" are not "properly filed," but state court applications containing claims that violate a "condition to obtaining relief" are "properly filed" nevertheless. Id.

The District Court noted that the Fifth and Ninth Circuits, applying Artuz, hold that untimely state post-conviction petitions may be "properly filed." Pace-2 at *5. Under Fifth and Ninth Circuit law, if the state time limit contains exceptions, and the state courts accept the petition for filing and review it to see if any exception is met, "the [state court] petition, even if untimely, should be regarded as 'properly filed,'" because such a time limit "'does not impose an absolute bar to filing' and is a 'condition to obtaining relief' rather than a 'condition to filing.'" Pace-2 at *5 (quoting Dictado, 244 F.3d at 728-29; citing Smith, 209 F.3d at 384-85).

The District Court found this Fifth and Ninth Circuit law persuasive, applied it to the PCRA time-bar, and held the PCRA time-bar a "condition to obtaining relief" on claims, rather than a "condition to filing" a petition. Pace-2 at *6. The District Court explained:

> [The PCRA time-bar] sets forth strict rules or conditions for obtaining relief under Pennsylvania law. However, this statute is not an absolute bar to filing a second or successive petition more than a year after the conviction became final. The statute contains exceptions that require "some level of judicial review" [Smith, 209 F.3d at 384] to examine the merits of the petition before it can be dismissed as time-barred. ...
>
> Therefore, this court sees [the PCRA time-bar] as imposing conditions for obtaining relief and not as an absolute bar to filing a petition. ... Mr. Pace's second PCRA petition was untimely under Pennsylvania law in that it was too late for him to obtain relief under Pennsylvania law, yet, the PCRA petition was "properly filed" for purposes of federal law and tolled AEDPA's statute of limitations ....

Pace-2 at *6. The District Court therefore found the habeas petition timely.[12]

The District Court also found equitable tolling appropriate, for several reasons.

First, as stated above, Pennsylvania law was unclear when Petitioner sought PCRA relief, and it seemed that relief might be available even if his claims were untimely. In particular, it seemed that relief might be available on an untimely claim if failure to raise the claim earlier resulted from ineffective assistance of counsel, failure to address the claim could create a miscarriage of justice, or the claim challenged an illegal sentence. Petitioner's PCRA petition alleged all of these bar-trumping rules; thus, it was reasonable for him to believe that state court relief might be available. Pace-1 at 594-95; Pace-2 at *9-*12.

Second, the District Court found that if Petitioner had filed a federal habeas petition, rather than his PCRA petition, Third Circuit precedent would have required that the habeas petition be dismissed and Petitioner would have been required to do what he did do – exhaust state remedies through the PCRA. Indeed, the District Judge found that he would have dismissed and required exhaustion in state court if Petitioner had filed a federal habeas petition instead of his PCRA petition. It plainly was reasonable for Petitioner to seek state court remedies at a time when Third Circuit law required that he do so. Pace-1 at 594-95; Pace-2 at *11-*12.

Third, the District Court noted that Petitioner is sentenced to life imprisonment without possibility of parole, an extremely severe sentence, weighing in favor of equitable tolling. Pace-1 at 595; Pace-2 at *12-*13.

Fourth, the District Court found that Petitioner had "diligently and reasonably asserted his claims" throughout all proceedings. Pace-2 at *12.

---

[12] The District Court declined to rely on a Third Circuit decision, Fahy v. Horn, 240 F.3d 239 (3d Cir. 2001), which had held that untimely PCRA proceedings are not "properly filed." The District Court noted that Fahy did not cite Artuz and, therefore, did not give "properly filed" the interpretation that Artuz requires. Pace-2 at *8. The District Court also noted that Fahy relied on a pre-Artuz decision of the Ninth Circuit which was vacated and disavowed after Artuz, when the Ninth Circuit decided Dictado, supra. Pace-2 at *8. The District Court therefore concluded that Fahy's holding, untimely-under-state-law = not-"properly-filed," was not binding.

Given these circumstances, the District Court allowed equitable tolling because denial of tolling, and the resulting loss of any federal review, would be "an extraordinary deprivation of rights" and "patently unfair." Pace-1 at 594-95.

Third Circuit: The Commonwealth appealed the District Court's AEDPA timeliness ruling. The Third Circuit reversed, holding that its decision in Merritt v. Blaine, 326 F.3d 159 (3d Cir. 2003), "controls the analysis here" and requires denial of both statutory and equitable tolling. Pace v. Vaughn, 2003 WL 21754982, *1 (3d Cir. July 30, 2003) ("Pace-3").

As to statutory tolling, Merritt held that a PCRA petition that is denied as untimely by the state courts is not "properly filed" under § 2244(d)(2) – i.e., untimely-under-state-law = not-"properly-filed." Merritt explicitly rejected the Fifth and Ninth Circuit law, relied on by the District Court, that finds state post-conviction proceedings "properly filed" under these circumstances. Thus, the Pace panel held, Merritt prohibits statutory tolling here. Pace-3 at *1.

As to equitable tolling, Merritt found that, in "1996, when [Merritt] filed his second pro se PCRA petition, the operation of the PCRA statute of limitations was uncertain" and PCRA relief seemed to be available for untimely claims. Id. at 169. Given the possible existence of PCRA remedies, "it was not unreasonable (indeed it was appropriate) for Merritt to have believed he was required to exhaust his state remedies by filing a second PCRA petition prior to filing a [federal] habeas petition," and Merritt "acted diligently and reasonably when he filed his second PCRA petition rather than filing a habeas petition." Merritt at 168-69. The Third Circuit, however, after finding that Merritt acted "diligently," "reasonably" and "appropriate[ly]" in seeking PCRA relief, still denied equitable tolling because it believed that only death-sentenced prisoners should get equitable tolling under such circumstances. Merritt at 170. Thus, Merritt prohibits equitable tolling here, where Petitioner, like Merritt, acted "diligently and reasonably," Pace-2 at *12, but where Petitioner, like Merritt, is sentenced to life-without-parole rather than death. Pace-3 at *1-*2.

REASONS FOR GRANTING THE WRIT

AEDPA's statute of limitations is tolled during "properly filed" state post-conviction proceedings. 28 U.S.C. § 2244(d)(2). It is undisputed that Petitioner's habeas petition is timely if his PCRA petition was "properly filed." This certiorari petition presents several important issues, which have divided the Courts of Appeal, regarding the meaning of "properly filed."

It is also undisputed that Petitioner's habeas petition is timely if his PCRA proceedings equitably tolled AEDPA's statute of limitations. This Court should grant the writ to resolve important equitable tolling issues and prevent the "patently unfair," "extraordinary deprivation of rights," Pace-1 at 594-95, caused by Third Circuit law.

I. This Court should grant the writ to resolve a conflict between the Courts of Appeal regarding an important question that this Court explicitly reserved in Artuz v. Bennett, 531 U.S. 4 (2000) – whether an untimely state post-conviction petition may be "properly filed" under § 2244(d)(2).

This Court interpreted "properly filed" in Artuz v. Bennett, 531 U.S. 4 (2000). This Court adopted a "broad reading" of "properly filed," Emerson v. Johnson, 243 F.3d 931, 935 (5th Cir. 2001), grounded in the distinction between state court rules that are "conditions to filing" and those that are "conditions to obtaining relief." Artuz, 531 U.S. at 11. If a state post-conviction petition violates a "condition to filing," it is not "properly filed." If the claims in the petition just violate a "condition to obtaining relief," however, the petition is "properly filed" nevertheless. Id. Thus, "whether [a petition] has been 'properly filed' is quite separate from ... whether the claims ... in the [petition] are ... free of procedural bar," and state post-conviction proceedings are "properly filed" even when all of the claims raised in those proceedings are procedurally barred under state law. Id., 531 U.S. at 9.

While Artuz generally held that violation of state court procedural bar rules does not prevent a state post-conviction petition from being "properly filed," there is one type of state court procedural bar rule for which Artuz explicitly declined to address this issue – time limits on state post-conviction proceedings. As to state court time-bars, Artuz stated:

> We express no view on the question whether the existence of certain exceptions to a [state court] timely filing requirement can prevent a late [state court] application from being considered improperly filed. See, e.g., Smith v. Ward, 209 F.3d 383, 385 (C.A.5 2000).

Artuz, 531 U.S. at 8 n.2.

This question that was reserved by Artuz has created a sharp conflict among the Courts of Appeal:

As stated in part A, infra, the Second, Fifth and Ninth Circuits hold that a state post-conviction petition that is untimely under state law is "properly filed" under § 2244(d)(2) if the state court time-bar contains exceptions and the state courts accept the petition for filing and review it to see if an exception is met. See Dictado v. Ducharme, 244 F.3d 724 (9th Cir. 2001); Smith v. Ward, 209 F.3d 383 (5th Cir. 2000); Robinson v. Ricks, 2003 WL 174628 (2d Cir. Jan. 22, 2003) (unpublished, text on Westlaw). Similarly, the Eleventh Circuit holds that a state post-conviction petition is "properly filed" if the state courts accept it for filing and have some discretion to review it on the merits, even if the state courts ultimately deny it as time-barred. See Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003).

As stated in part B, infra, the Third and Seventh Circuits explicitly reject the Second, Fifth, Ninth and Eleventh Circuits' law, and hold that an untimely state post-conviction proceeding is never "properly filed," even when state law requires the state courts to accept the state post-conviction petition for filing and review it to see if any of its claims satisfy an exception to the time-bar. See Merritt v. Blaine, 326 F.3d 159 (3d Cir. 2003); Brooks v. Walls, 301 F.3d 839 (7th Cir. 2002).

This Court should grant the writ to resolve this conflict between the Courts of Appeal on this important matter. See Supreme Court Rule 10(a).

A. The Second, Fifth, Ninth and Eleventh Circuits hold that untimely state post-conviction proceedings can be "properly filed" under § 2244(d)(2).

The Second, Fifth, Ninth and Eleventh Circuits have answered the question this Court reserved in Artuz by holding that untimely state post-conviction proceedings can be "properly filed" under § 2244(d)(2).

In Smith v. Ward, 209 F.3d 383, 384-85 (5th Cir. 2000), the Fifth Circuit held that a Louisiana post-conviction petition that had been held untimely by the state courts was "properly filed" under § 2244(d)(2) because the state courts accepted the petition for filing and reviewed it to determine if it satisfied any exception to the time limit.[13] Because the state courts "accept a prisoner's application for filing and review it to determine whether any of the statutory exceptions to untimely filing are applicable," the state court time-bar "does not impose an absolute bar to filing; instead, it limits the state court's ability to grant relief." Smith, 209 F.3d at 385 (emphasis original). Accordingly, the "state application, although ultimately determined by the state court to be time-barred, nevertheless was 'properly filed,' within the meaning of § 2244(d)(2)." Id.[14]

Similarly, in Dictado v. Ducharme, 244 F.3d 724, 726-28 (9th Cir. 2001), the Ninth Circuit held that a Washington post-conviction petition that had been held untimely by the state courts was nevertheless "properly filed" under § 2244(d)(2) because the state courts accepted the petition and reviewed it to determine if it satisfied any exception to the time limit.[15] Because the state courts allowed the petition to be filed and gave it some review before dismissing it, the state time-bar was "properly regarded as a 'condition to obtaining relief' rather than a 'condition to filing'" and, therefore, the state proceedings were "properly filed" under Artuz. Dictado, 244 F.3d at 728

---

[13] The Louisiana time limits at issue in Smith are similar to the PCRA time limits at issue here – a fixed limitation period together with several exceptions for after-discovered evidence, new rules of constitutional law, etc. Compare La.Code Crim. P. art. 930.8A (partially quoted in Smith, 209 F.3d at 385), with, 42 Pa. C.S. § 9545(b).

[14] Smith is a pre-Artuz decision, but it relies on Artuz's distinction between "condition to filing" and "condition to obtaining relief." The Fifth Circuit has held that Smith states the Fifth Circuit's post-Artuz law. Emerson, 243 F.3d at 933.

[15] The Washington time limits in Dictado, see Wa.Rev.Code §§ 10.73.90, 10.73.100 (partially quoted in Dictado at 727-28), like the Louisiana time limits in Smith, are similar to the PCRA time limits.

(quoting Artuz).[16]

The Second Circuit seems to have adopted the Fifth and Ninth Circuits' analysis. See Robinson v. Ricks, 2003 WL 174628 (2d Cir. Jan. 22, 2003) (unpublished, text on Westlaw). In Robinson, the district court applied the Ninth Circuit's Dictado decision and held that state post-conviction proceedings were "properly filed" even though they were untimely under state law, because the state court time limits had exceptions and the state courts accepted the post-conviction submission and reviewed it to see if it met an exception to the time-bar. Robinson v. Ricks, 163 F.Supp.2d 155, 161 (E.D.N.Y. 2001) (citing Artuz; Dictado). The district court held, however, that nothing was "pending" during a gap between lower and upper court filings, and found the habeas petition untimely because the AEDPA time expired without tolling during that gap. Id. at 161-70. The Second Circuit reversed the district court's time-bar ruling, holding that, under Carey v. Saffold, 536 U.S. 214 (2002), the state court proceedings were "pending" during the gap between lower and upper courts. The Second Circuit did not disturb the district court's holding, based on the Ninth Circuit's approach, that the state post-conviction proceedings were "properly filed" even though they were untimely under state law.

The Eleventh Circuit has taken a slightly different approach but reached the same conclusion as the Second, Fifth and Ninth Circuits – untimely state post-conviction proceedings may be "properly filed" under § 2244(d)(2). See Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003). The Eleventh Circuit cited the Fifth Circuit (Smith) and Ninth Circuit (Dictado) decisions with approval, and held that a state post-conviction petition that was time-barred by the state courts was "properly filed" under § 2244(d)(2) because the state courts had discretion to ignore the time bar and reach the merits of the claims, even though they did not actually exercise that discretion to address the merits

[16] Dictado is particularly instructive because the Ninth Circuit first ruled before this Court decided Artuz, and held that a time-barred state post-conviction petition could not be "properly filed." Dictado v. Ducharme, 189 F.3d 889 (9th Cir. 1999). After Artuz, the Ninth Circuit vacated its 1999 Dictado opinion and replaced it with the above-described Dictado opinion, which applied Artuz and found that a time-barred state post-conviction petition was "properly filed."

in that case. See Siebert, 334 F.3d at 1032.

B. The Third and Seventh Circuits hold that all untimely state post-conviction proceedings are per se not "properly filed" under § 2244(d)(2).

The Third and Seventh Circuits have also answered the question that Artuz reserved, but in a way that directly conflicts with, and explicitly rejects, the above-described Second, Fifth, Ninth and Eleventh Circuit law. In the Third and Seventh Circuits, if the state courts hold a state post-conviction petition untimely, it was not "properly filed," even when state law allowed the filing and required the state courts to review the petition to determine if any claims met an exception to the state court time limit. In other words, the Third and Seventh Circuits hold that untimely-under-state-law = not-"properly-filed." See Merritt v. Blaine, 326 F.3d 159 (3d Cir. 2003); Brooks v. Walls, 301 F.3d 839 (7th Cir. 2002).

In Brooks, the Seventh Circuit held that an untimely state post-conviction petition was not "properly filed," even though the petition was accepted for filing by the state courts and state law required the state courts to review it to determine if any claims met an exception to the state court time limit. The Seventh Circuit explicitly rejected the above-described Fifth and Ninth Circuit law, stating: "[D]ecisions such as ... Smith v. Ward, ... and Dictado v. Ducharme, ..., to the extent they hold that petitions untimely under state rules nonetheless may be deemed 'properly filed,' were wrongly decided." Brooks, 301 F.3d at 841.

Third Circuit law is also directly contrary to, and explicitly rejects, Fifth and Ninth Circuit law. In Merritt, the precedent used to deny tolling here, the Third Circuit noted that under Fifth and Ninth Circuit law an untimely PCRA petition (such as that filed by Petitioner here) would be "properly filed" because state law requires the state courts to accept the PCRA petition for filing and review it to see if any claims meet an exception to the PCRA time-bar. See Merritt, 326 F.3d at 164-65 (citing Smith; Dictado); id. at 171 (Rosenn, J., dissenting) (same). The Merritt majority, however, declined to follow Fifth/Ninth Circuit law because it believed itself bound by a prior Third Circuit decision, Fahy v. Horn, 240 F.3d 239 (3d Cir. 2001), which held that "an untimely PCRA

petition does not toll the statute of limitations for a federal habeas corpus petition." Merritt, 326 F.3d at 165. The Merritt dissent noted that the majority's denial of tolling was "in conflict with the well-reasoned opinions of the Fifth and Ninth Circuit[s]" in Smith and Dictado, would have followed the Fifth and Ninth Circuits' approach, and, therefore, would have found the untimely PCRA proceedings "properly filed." Merritt at 171 (Rosenn, J., dissenting).[17]

This Court should grant the writ and resolve this conflict between the Courts of Appeal.

II. This Court should grant the writ to resolve a conflict between the Courts of Appeal regarding whether Carey v. Saffold, 536 U.S. 214 (2002), answered the question about "properly filed" that was reserved in Artuz.

The above-described Third and Seventh Circuit law (untimely-under-state-law = not-"properly-filed") is based in part on those Circuits' misreading of this Court's decision in Carey v. Saffold, 536 U.S. 214 (2002). The Third and Seventh Circuits erroneously hold that Saffold answered the "properly filed" question this Court reserved in Artuz, and that Saffold held that an untimely state post-conviction petition is per se not "properly-filed" under § 2244(d)(2). See part A, infra.

The Second, Fifth, Ninth and Eleventh Circuits disagree with the Third and Seventh Circuits – they correctly recognize that Saffold did not answer (or even ask) the "properly filed" question that Artuz reserved. See part B, infra.

This Court should grant the writ to resolve this conflict between the Courts of Appeal regarding the meaning of Saffold. See Supreme Court Rule 10(a).

[17] In Nara v. Frank, 264 F.3d 310, 316 (3d Cir. 2001), an earlier Third Circuit panel cited the Ninth Circuit's Dictado decision with approval. The Third Circuit, however, has since made clear that it rejects the Ninth Circuit's approach; has limited Nara to its facts; and has stated that it would decide Nara differently if it revisited it today. See Merritt, 326 F.3d at 165-66 nn.6-7; Phillips v. Vaughn, 2003 WL 202472, *2 (3d Cir. Jan. 29, 2003) (unpublished, text on Westlaw).

A. The Third and Seventh Circuits erroneously believe that Saffold decided the "properly filed" issue that Artuz reserved.

The Third and Seventh Circuits erroneously believe that Saffold answered the "properly filed" question that this Court expressly reserved in Artuz. According to the Seventh Circuit:

> The question in Saffold was whether an original petition for collateral relief, filed in the Supreme Court of California, counted as a "properly filed" application given California's unusual system of collateral review. ... Saffold tells us (ending any ambiguity left by Artuz) that to be "properly filed" an application for collateral review in state court must satisfy the state's timeliness requirements.

Brooks, 301 F.3d at 840-41; see also Merritt, 326 F.3d at 166 (similar holding).

The Third and Seventh Circuits are wrong about Saffold, which did not even mention, let alone answer, the "properly filed" question that Artuz reserved. Indeed, Saffold says nothing whatsoever about the meaning of "properly filed."

Saffold did not rule on, discuss, or even mention "properly filed" – the words "properly filed" do not even appear in the Saffold Court's opinion. Saffold considered only the issue of whether state post-conviction proceedings were "pending" during a time-gap between the filing of a California prisoner's trial court post-conviction petition and his filing of an original state habeas petition in the appellate court (California's unusual method for seeking state post-conviction relief), even though there was no document actually filed in any court during that time. Saffold is utterly clear, from beginning to end, that it concerns only the meaning of "pending" under these unusual circumstances, not the meaning of "properly filed."

Saffold began by stating the questions presented, all of which were concerned solely with the meaning of "pending," not "properly filed":

> This case raises three questions related to the statutory word "pending":
>
> (1) Does that word cover the time between a lower state court's decision and the filing of a notice of appeal to a higher state court?
>
> (2) If so, does it apply similarly to California's unique state collateral review system – a system that does not involve a notice of appeal, but rather the filing (within a reasonable time) of a further original state habeas petition in a higher court?

(3) If so, was the petition at issue here (filed in the California Supreme Court 4½ months after the lower state court reached its decision) pending during that period, or was it no longer pending because it failed to comply with state timeliness rules?

Saffold, 536 U.S. at 217; see also id. at 228 (Kennedy, J, dissenting) ("[T]he question in this case: whether an application was pending in the 4-month period between the denial of respondent's habeas petition in the California Court of Appeal and his filing of a new petition in the California Supreme Court.").

Saffold then discussed these questions about "pending" without ever even mentioning the words or concept "properly filed." Thus, Saffold cannot sensibly be said to have held anything about the meaning of "properly filed."

Moreover, it is particularly odd for the Third and Seventh Circuit to assert that Saffold decided the "properly filed" issue reserved by Artuz, because the Saffold opinion does not even cite Artuz. It is utterly implausible that this Court would decide an important issue that it reserved in Artuz without even mentioning Artuz.

It is also clear from the briefs in Saffold that this Court did not address, let alone decide, anything about the meaning of "properly filed." The lower court in Saffold applied Dictado, supra, and unanimously held that the state court proceedings were "properly filed" even if untimely. See Saffold v. Newland, 250 F.3d 1262, 1268 n.8 (9th Cir. 2001); id. at 1269 n.1 (O'Scannlain, J, dissenting). The lower court's "properly filed" holding was not challenged in this Court. Instead, the Saffold briefs were concerned solely with whether anything was "pending" during the gaps between the lower and upper state courts. Indeed, one of the briefs explicitly noted that there was no "properly filed" issue before this Court:

> The Ninth Circuit held that [Saffold's] petition in the California Supreme Court was "properly filed." [citing Saffold v. Newland, 250 F.3d at 1268 n.8]. Amici disagree. An application for relief is not "properly filed" when it is filed outside the time allotted under state rules and is denied [as untimely]. (Amici recognize thus Court left that question open in Artuz v. Bennett, 531 U.S. 4, 8 n.2 (2000).) Because however the issue before this Court is the meaning of the term "pending" this brief assumes arguendo that respondent's petition was "properly filed."

Newland v. Saffold, Brief of the States of North Carolina, et al., as Amici Curiae, 2001 WL 1548793, *3 n.1 (U.S. Nov. 29, 2001).

Saffold plainly did not decide the "properly filed" issue Artuz reserved, and the Third and Seventh Circuit's erred when they held that it did.

B. The Second, Fifth, Ninth and Eleventh Circuits recognize that Saffold did not decide the "properly filed" issue that Artuz reserved.

The Third and Seventh Circuits' misreading of Saffold is at odds with post-Saffold decisions of the Second, Fifth, Ninth and Eleventh Circuits, which recognize that Saffold interpreted "pending," not "properly filed," and did not answer the question this Court left open in Artuz.

The Ninth Circuit, in the Saffold remand, confirmed that Saffold was about the meaning of "pending" during gaps in the state court proceedings, not "properly filed." On remand, the Ninth Circuit found that the California Supreme Court's "lack of diligence" holding referred to Saffold's 5 year delay between direct appeal and filing his post-conviction petition in the lower court, not the 4½ month gap between the lower court and upper courts. Saffold v. Carey, 312 F.3d 1031, 1035 (9th Cir. 2003) ("Saffold-2"). Thus, the proceedings were "pending" during that 4½ month gap. Id.

Significantly, the Ninth Circuit reaffirmed its earlier decision (Saffold v. Newland, 250 F.3d at 1268 n.8, discussed above) that the state post-conviction proceedings were "properly filed" despite being untimely under state law, because the state time limits, like Pennsylvania's, require the state courts to accept the petition and review it for timeliness – they are a "condition to obtaining relief," not a "condition to filing" under Artuz. Saffold-2, 312 F.3d at 1035. Thus, the Ninth Circuit certainly did not believe that this Court decided the "properly filed" issue.

Other post-Saffold Ninth Circuit decisions have reaffirmed that Saffold did not alter the Ninth Circuit's "properly filed" analysis, as described in Dictado, and that untimely state post-conviction petitions are "properly filed" when the state court time limit contains exceptions and the state courts accept petitions for filing and review them to determine if any exception is met. For example, in Jenkins v. Johnson, 330 F.3d 1146, 1150-53 & n.3 (9th Cir. 2003), the court applied

Dictado, held that untimely state post-conviction proceedings were "properly filed" under § 2244(d)(2), and explained that Saffold "did not undermine" Dictado "either intentionally or by implication" because Saffold did not address "properly filed" and, instead, "was making a limited point" about the meaning of "pending" under California's "unusual system." See also id. (Saffold "did not consider whether or not California's timeliness rule was a condition to filing or a condition to obtaining relief [i.e., the 'properly filed' issue], as that issue was not before the Court."); id. at 1156 (O'Scannlain, J. dissenting) (same "properly filed" analysis); Yoshisato v. Terhune, 2003 WL 21153486, *1 (9th Cir. May 16, 2003) (unpublished, text on Westlaw) ("a California state habeas petition that subsequently is denied as untimely due to delay in filing may still be 'properly filed'" (citing Dictado; Saffold-2)); Austin v. Larsen, 2003 WL 21378598, *1 (9th Cir. June 11, 2003) (unpublished, text on Westlaw) ("The district court ruled that Austin's first petition in the state trial court could not begin the tolling of AEDPA because it was held to be untimely by the state court. Our decision in Dictado ..., decided after the district court's ruling, makes clear that a petition dismissed for untimeliness is nevertheless 'properly filed'").

Post-Saffold decisions of the Second, Fifth and Eleventh Circuits similarly recognize that Saffold did not decide anything about the meaning of "properly filed," and, in particular, did not decide the issue reserved by Artuz. After Saffold, as before, untimely state post-conviction proceedings may be "properly filed." See Robinson v. Ricks, 2003 WL 174628 (2d Cir. Jan. 22, 2003) (unpublished, text on Westlaw), and Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003), both discussed above; Robertson v. Cain, 324 F.3d 297, 302 (5th Cir. 2003) (Smith v. Ward's "properly filed" analysis is still Fifth Circuit law post-Saffold).

This Court should grant the writ and resolve this conflict between the Courts of Appeal.

III. This Court should grant the writ because the Third Circuit erred in its resolution of the important issue that this Court reserved in Artuz.

This Court has not decided the statutory tolling issue presented here – can an untimely state post-conviction petition be "properly filed" under § 2244(d)(2)? This Court should grant the writ to decide this important issue. See Supreme Court Rule 10(c). Moreover, this is a particularly apt case in which to grant the writ, because the Third Circuit answered this question erroneously. While Artuz reserved the specific issue presented here, Artuz's analysis shows that Petitioner's PCRA proceedings were "properly filed," and the Third Circuit erred in holding they were not.

A. The Third Circuit defines "properly filed" in a way that was rejected by Artuz, and that is inconsistent with this Court's precedent regarding the importance of habeas corpus.

Artuz rejected the argument that a state court procedural bar ruling makes the state court proceedings not "properly filed" under § 2244(d)(2):

> [The state] contends ... that an application for state postconviction ... review is not "properly filed" ... unless it complies with all mandatory state-law procedural requirements that would bar review of the merits of the application. We disagree.

Artuz, 531 U.S. at 8.

According to the Third Circuit, however: "AEDPA explicitly directs us to toll the statute of limitations only when" the PCRA claims do not violate "the state's procedural requirements." Fahy v. Horn, 240 F.3d 239, 243 (3d Cir. 2001).[18] In particular, because the PCRA time-bar is one of "the state's procedural requirements," the Third Circuit holds that an untimely PCRA petition is not "properly filed." Id.

The Third Circuit's approach was rejected in Artuz. The Third Circuit plainly errs when it says "AEDPA explicitly directs" tolling "only" when the claims do not violate "the state's procedural

[18] This was the holding that was adopted in Merritt and applied here. See Merritt, 326 F.3d at 165-66; Pace-3 at *1.

requirements." Instead, AEDPA "explicitly directs" tolling during "properly filed" state court proceedings, and Artuz held that state court proceedings are "properly filed" when the claims violate "the state's procedural requirements." Thus, the Third Circuit's law (state-procedural-bar = not-"properly-filed") was rejected by Artuz.

The Third Circuit's approach is also inconsistent with this Court's precedent regarding the importance of the writ of habeas corpus, and the need for clear, fair rules governing access to the writ. The Third Circuit makes the "properly-filed"-or-not status of state post-conviction proceedings depend entirely upon the state courts' ultimate ruling – if the state court ultimately deems the claims timely, they were "properly filed" all along; if it ultimately deems them untimely, they were never "proper filed." This outcome-determined approach makes it impossible for petitioners to know ahead of time whether their state court proceedings will ultimately be deemed "properly filed" or not, especially where, as here, state law is unclear at the time of the state court filing.

Because habeas corpus is the "highest safeguard of liberty," Lonchar v. Thomas, 517 U.S. 314, 322 (1996), and "plays a vital role in protecting constitutional rights," Slack v. McDaniel, 529 U.S. 473, 483 (2000), "it is particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair." Lonchar at 330. The Third Circuit's approach violates this fundamental principle because it denies prisoners all access to federal habeas review simply because they could not predict how the state courts would ultimately rule. The Third Circuit's outcome-determined test cannot be squared with this Court's law.[19]

[19] In the procedural default context, a state court procedural bar ruling may bar federal merits review of individual claims. But procedural default of claims never bars all federal review, as the Third Circuit's approach does. Moreover, procedural default rules do not bar federal merits review at all, even of individual claims, when the state court ruling is not an "adequate and independent state ground" or when the petitioner can establish "cause and prejudice" or a "miscarriage of justice." E.g., Lee v. Kemna, 534 U.S. 362 (2002). The Third Circuit's definition of "properly filed" does not allow such safety valves, and offers no protection from arbitrary, unpredictable state court rulings: under Third Circuit law, if the state court applies a time-bar the federal court must find the

B. Under Artuz's analysis, a PCRA petition that is ultimately deemed untimely by the state courts is "properly filed" under § 2244(d)(2).

As stated above, Artuz's "properly filed" analysis is grounded in the distinction between "conditions to filing" and "conditions to obtaining relief." Id., 531 U.S. at 11. If a state post-conviction petition violates a "condition to filing," it is not "properly filed." If the claims in the petition just violate a "condition to obtaining relief," however, the petition is "properly filed." Here, the state court ultimately used a procedural rule, the PCRA time-bar, to deny Petitioner's claims. Under Artuz's analysis, however, the PCRA time-bar is a "condition to obtaining relief" on claims, not a "condition to filing" the petition.

Artuz gives an example of a typical "condition to filing," violation of which would make a petition not "properly filed": the rule governing filing of successive federal habeas petitions, which requires a would-be petitioner to obtain permission before filing a successive petition. Id. at 10 (citing 28 U.S.C. § 2244(b)(3)(A)). The PCRA time limit is utterly different from Artuz's paradigmatic "condition to filing." A PCRA petitioner does not need permission to file a PCRA petition, even if it is facially untimely. Instead, s/he is entitled to file such a petition, in the same court where any PCRA petition is filed; and the state courts are required to accept such petitions for filing.[20] When a petition is filed, the state courts are required to carefully review it to determine if any claims are timely; if the lower court determines that the claims are untimely, the petitioner is entitled to appellate review of that decision.[21] There is no barrier whatsover to filing and judicial

proceedings not "properly filed."

[20] See 42 Pa. C.S. § 9545(a) (all PCRA petitions filed in Court of Common Pleas); Lovasz v. Vaughn, 134 F.3d 148, 148-49 (3d Cir. 1998) ("While ... the Pennsylvania Supreme Court has announced strict rules [the PCRA time limits] regarding the granting of second and subsequent PCRA petitions, Pennsylvania allows for the filing of second or subsequent PCRA petitions").

[21] E.g., Beasley, 741 A.2d at 1261 ("review[ing] the numerous issues set forth in appellant's brief in an effort to ascertain whether any of those issues" are timely); Commonwealth v. Perry, 716

review – the PCRA time-bar is not a "condition to filing."

The specific facts of this case confirm that the state court rules allow the filing and litigation of a PCRA petition, even if the claims in that petition are ultimately deemed untimely. Here, the state courts allowed Petitioner to file his November 1996 PCRA petition, as they were required to do by state law. Indeed, the Court of Common Pleas appointed counsel to represent Petitioner; gave appointed counsel an opportunity to amend and brief the PCRA petition; and decided the claims on the merits, rather than on the basis of a PCRA time-bar. Similarly, the Superior Court allowed Petitioner to appeal the denial of PCRA relief, as it was required to do under state law; and the Pennsylvania Supreme Court allowed him to seek review of the Superior Court's decision, as it was required to do under state law. Of course, the Superior Court ultimately denied Petitioner's claims as untimely – it applied the PCRA time-bar as a "condition to obtaining relief" – and the Pennsylvania Supreme Court left that ruling undisturbed. This ultimate outcome, however, does not alter the fact that Petitioner was allowed to file and litigate the proceedings, and was afforded judicial review. The PCRA time-bar is not a "condition to filing."

The PCRA time-bar's status as a "condition to obtaining relief" on claims, rather than a "condition to filing" a petition, is also apparent from the fact that PCRA timeliness vel non is decided on a claim-by-claim basis – a PCRA petition filed outside the general one year limit may

A.2d 1259, 1260-61 (Pa. Super. 1998) (state courts must conduct "thorough review" of PCRA petition to determine if any claims are timely; petitioner has right to appellate review of untimeliness ruling); Commonwealth v. Austin, 721 A.2d 375, 377 (Pa. Super. 1998) (same); Commonwealth v. Ferguson, 722 A.2d 177, 178 (Pa. Super. 1998) (same); see also Commonwealth v. Smith, 818 A.2d 494, 498-501 (Pa. 2003) (first time petitioner entitled to appointment of counsel and counseled amendment of petition even where petition is facially untimely); Commonwealth v. Perez, 799 A.2d 848, 851 (Pa. Super. 2002) (same); Commonwealth v. Guthrie, 749 A.2d 502, 504 (Pa. Super. 2000) (same); Ferguson, 722 A.2d at 179-80 (same).

contain both timely and untimely claims.[22] As Artuz explains, section 2244(d)(2) "refers only to 'properly filed' applications and does not contain the peculiar suggestion that a single application can be both 'properly filed' and not 'properly filed'" because some claims in the application are timely and others are not. Artuz at 10. Since a PCRA petition may contain both timely and untimely claims, the PCRA time-bar is a "condition to obtaining relief" on claims, not a "condition to filing" the petition.

Under Artuz's analysis, Petitioner's PCRA petition was "properly filed." This Court should grant the writ to conform the Third Circuit's law to this Court's precedent.

IV. This Court should grant the writ and review the Third Circuit's denial of equitable tolling, which denies all federal habeas review to petitioners who act "appropriately," "reasonably" and "diligently," and as demanded by the exhaustion requirement, in seeking state court remedies.

The Third Circuit's erroneous approach to statutory tolling (described above) is particularly unfair because it is combined with an extraordinarily harsh approach to equitable tolling, which denies equitable tolling in cases, like this, where the petitioner acted "appropriately," "diligently," and "reasonably" in seeking state court remedies at a time when they appeared to be available, and when seeking such state court remedies was required by the exhaustion requirement. See Pace-2 at *11-*12 (Petitioner "diligently and reasonably asserted his claims"; if Petitioner had tried to file a

[22] E.g., Commonwealth v. Morris, 822 A.2d 684, 695-99 (Pa. 2003) (four claims decided on merits; four claims denied as untimely; two claims denied on the merits and as untimely; one claim denied on procedural grounds other than time-bar); Commonwealth v. Abdul-Salaam, 812 A.2d 497, 502-04 (Pa. 2002) (three claims decided on merits; one claim denied as untimely; one claim denied on procedural grounds other than time-bar); Commonwealth v. Lark, 746 A.2d 585, 588-91 (Pa. 2000) (two claims decided on merits; three claims denied as untimely); Commonwealth v. Cross, 726 A.2d 333, 335-37 (Pa. 1999) (one claim decided on merits; three claims denied as untimely); Beasley, 741 A.2d at 1261 ("review[ing] the numerous issues set forth in appellant's brief in an effort to ascertain whether any of those issues" are timely). This claim-by-claim approach to timeliness is required by the PCRA's statutory language, which inquires separately about timeliness of each "claim" raised or "right asserted," whenever the petition is filed outside the general one year period. 42 Pa. C.S. § 9545(b)(1)-(2).

habeas petition instead of a PCRA petition, the habeas petition would have been dismissed and he would have been required to file the PCRA petition); Merritt, 326 F.3d at 168-69 (denying equitable tolling where "it was not unreasonable (indeed it was appropriate) for Merritt to have believed he was required to exhaust his state remedies by filing a second PCRA petition prior to filing a [federal] habeas petition," and he "acted diligently and reasonably when he filed his second PCRA petition rather than filing a habeas petition").

The Third Circuit's erroneous statutory tolling law makes the habeas petitioner's ability to obtain any federal review completely dependent on the state courts' ultimate ruling – if the state court ultimately deems the claims timely, they were "properly filed" all along; if it ultimately deems them untimely, they were never "proper filed." In the interest of fundamental fairness, a court that adopts such an outcome-determined approach to statutory tolling should at least couple it with an equitable tolling analysis that allows tolling when the ultimate outcome is not clear at the time the petitioner originally seeks state court remedies. The Third Circuit, however, has not done so. Instead, it denies equitable tolling where, as here, the petitioner acts diligently, reasonably and appropriately in seeking state court remedies when those remedies appear to be available, and when pursuit of those remedies is actually required by the exhaustion requirement. This result is Kafkaesque – the petitioner does everything reasonably and as required by current law, and then is thrown out of court. A proper equitable tolling analysis requires equitable tolling here, for the following reasons.

1. As stated above, when Petitioner filed his PCRA petition, it seemed that the state courts would give merits review even if his claims were untimely under the PCRA's statutory language. The state courts had a long tradition of disregarding the PCRA's statutory bar rules when the petitioner alleged, as Petitioner did here, ineffective assistance of counsel, miscarriage of justice, and/or illegality of sentence; it was reasonable to believe the state courts would continue to apply

these bar-trumping rules; in particular, it was reasonable to believe they would trump the PCRA time-bar. Ultimately, the state courts abandoned their traditional anti-bar rules, strictly applied the PCRA time-bar, and denied Petitioner's claims as untimely. That change in state law, however, occurred long after Petitioner filed his PCRA petition. See Statement of the Case, supra.

Under these circumstances, where Petitioner diligently sought relief in a forum (state court) that reasonably appeared to be available, where he sought that relief within the AEDPA year, and where he only later found that relief was not available after all, this Court and the Courts of Appeals generally allow equitable tolling.[23] Similarly, equitable tolling should be allowed here.

2. Because state court remedies appeared to be available to Petitioner, federal law required him to pursue those state court remedies, by filing a PCRA petition, before filing a federal habeas petition. The Third Circuit requires Pennsylvania prisoners to file PCRA petitions and exhaust state court remedies if there is any possibility of state court merits review.[24] Applying this law, the Third Circuit and District Courts in Pennsylvania, from September 1996 through December

---

[23] E.g., Burnett v. New York Central R. Co., 380 U.S. 424, 430 (1965) (equitable tolling to avoid "unfairness of barring ... action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run"); Clymore v. United States, 217 F.3d 370, 376 (5th Cir. 2000) (equitable tolling where litigant filed in wrong venue and statute of limitations expired during wrong venue litigation; "Given (1) the uncertainty of the law regarding the proper venue in which to file and (2) the government's awareness [that Clymore was seeking relief], the limitations period should be equitably tolled."); Doherty v. Teamsters Pension Trust Fund, 16 F.3d 1386, 1393 n.7 (3d Cir. 1994) (when there are "uncertainties about the law" regarding forum where claims should be filed, equitable tolling avoids "penaliz[ing] litigants for having made questionable procedural choices of fora"); Husch v. Szabo Food Service Co., 851 F.2d 999, 1003-04 (7th Cir. 1988) (equitable tolling where plaintiff filed claims in wrong forum because of "confusing" law); see also Young v. United States, 535 U.S. 43, 50 (2002) ("This Court has permitted equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period" (internal quotation marks omitted)).

[24] Lovasz, 134 F.3d at 148 (exhaustion required "unless state law 'clearly foreclose[s]'" merits review (quoting Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993))); Doctor, 96 F.3d at 683 (exhaustion required unless federal court is "certain that state review is clearly foreclosed").

1998, consistently required Pennsylvania prisoners to seek PCRA remedies before seeking federal habeas review even when their claims seemed to be time-barred by the PCRA's statutory language, because the above-described state law suggested that state court merits review might be available.[25]

In compliance with Third Circuit exhaustion law at the time, Petitioner filed his PCRA petition to exhaust seemingly available state court remedies before filing his federal habeas petition. If Petitioner had instead filed a federal habeas petition, Third Circuit law would have required that it be dismissed for lack of exhaustion. Indeed, the District Judge here expressly found that if Petitioner had tried to file a federal habeas petition, rather than the PCRA petition that he did file, the federal habeas petition "would have been dismissed" and Petitioner would have been required to do what he did do – file a PCRA petition to exhaust state remedies before seeking federal review.

---

[25] E.g., Lambert v. Blackwell, 134 F.3d 506, 520-24 (3d Cir. 1998) (requiring exhaustion of PCRA remedies where claims were time-barred by PCRA's statutory language; while a "literal reading of [the PCRA time-bar] indicate[d]" that the claims were untimely, a "literal reading" of the statute was not dispositive because Pennsylvania's courts had long "expressed a willingness to depart from the PCRA's stringent [statutory] waiver standards" based on allegations of miscarriage of justice, ineffective assistance of counsel, or other "manifest injustice"); Doctor v. Walters, 96 F.3d 675, 681-83 (3d Cir. 1996) (requiring exhaustion of PCRA remedies where claims were time-barred by the PCRA's statutory language, because petitioner's claimed Sixth Amendment violation could establish a "miscarriage of justice" as defined in Pennsylvania and, thus, trump the PCRA's statutory bars); Blasi v. Attorney General, 30 F.Supp.2d 481, 487-88 (E.D. Pa. Dec. 17, 1998) (requiring exhaustion of claims that were untimely under the PCRA because PCRA time-bar and other statutory bars may be trumped by miscarriage of justice and/or ineffective assistance of counsel); Williams v. Vaughn, 3 F.Supp.2d 567, 573-74 (E.D. Pa. March 18, 1998) (same); Morris v. Horn, 1998 WL 150956, *2-*3 (E.D. Pa. March 19, 1998) (same); Hammock v. Vaughn, 1998 WL 163194, *5-*6 (E.D. Pa. April 7, 1998) (same); Peterkin v. Brennan, 1998 WL 470139, *5-*6 (E.D. Pa. Aug. 11, 1998) (same); Crawley v. Horn, 7 F.Supp.2d 587, 588 (E.D. Pa. June 11, 1998) (requiring exhaustion of claims that were untimely under the PCRA because miscarriage of justice might trump time-bar); Peterkin v. Horn, 30 F.Supp.2d 513, 519-20 (E.D. Pa. Dec. 15, 1998) (same); Weakland v. White, 1997 WL 799433, *3 (E.D. Pa. Dec. 29, 1997) (same); Belle v. Stepanik, 1996 WL 663872, *4-*8 & n.5 (E.D. Pa. Nov. 14, 1996) (because "miscarriage of justice" exception to waiver not based on PCRA's statutory language, the 1996 PCRA "amendments probably do not eliminate the ... miscarriage of justice exception")

Pace-1 at 594; Pace-2 at *11-*12.[26]

Under these circumstances, where Petitioner's state court filing was required by Third Circuit and district court precedent regarding exhaustion of state remedies, denial of tolling during the state court proceedings simply cannot be correct. As the District Court found, it is "an extraordinary deprivation of rights" and "patently unfair" for the habeas courts to now deem Petitioner time-barred under AEDPA for doing what he was required to do by Third Circuit exhaustion law – exhaust state remedies before pursuing federal review. Pace-1 at 594-95. Equitable tolling is plainly appropriate.[27]

---

[26] In Merritt, 326 F.3d at 169, the Third Circuit suggested that applicability of the PCRA time-bar "became clear" in December 1997, when Superior Court panels decided Alcorn and Conway (see discussion of these cases in Statement of the Case, supra). But Alcorn and Conway did not make state law "clear." As decisions of Pennsylvania's intermediate appellate court, they could not make state law clear, since they were not the last word on questions of state law. Moreover, they left open the possibility that the traditional court-made anti-bar rules (miscarriage of justice, ineffective assistance of counsel, illegal sentence) would overcome the PCRA time-bar – Conway assumed that an illegal sentence claim, such as that raised by Petitioner, would trump the time-bar. Any suggestion that Alcorn and Conway made state law clear is also contrary to numerous Third Circuit and district court decisions, post-dating Alcorn and Conway, holding that the traditional anti-bar rules might trump the time-bar and requiring petitioners to seek PCRA remedies on facially untimely claims. See supra. Finally, even if Conway and Alcorn had made state law clear, Petitioner started the exhaustion process long before they were decided, and had to present his claims to all levels of the state courts to avoid a federal court procedural default ruling. See O'Sullivan v. Boerckel, 526 U.S. 838 (1999).

[27] The Third Circuit admits that denial of tolling under these circumstances "create[s] a tension" between AEDPA's time limits and "the need to exhaust state remedies." Merritt, 326 F.3d at 170 n.10. The Third Circuit suggested that habeas courts could "ameliorate" this problem by holding federal proceedings in suspense while state remedies are exhausted, but noted that "this procedure would be inapplicable" to Petitioner because he "chose to file his petition in state court rather than in federal court." Id. But it is grossly unfair to penalize Petitioner for not seeking "suspense" from the District Court before exhausting state remedies. At the time that Petitioner was litigating his PCRA petition, the Third Circuit did not allow district courts to hold federal habeas proceedings in suspense during exhaustion – Third Circuit law required that mixed habeas petitions be dismissed. See Christy v. Horn, 115 F.3d 201 (3d Cir. 1997); Baker v. Horn, 210 F.Supp.2d 592, 607 (E.D. Pa. 2002); Crawley, 7 F.Supp.2d at 589; Williams v. Vaughn, 1998 WL 238466, *2 n.3 (E.D. Pa.). Thus, if Petitioner had filed a federal petition before exhausting state remedies, it would

3. Petitioner's pro se status, indigence, and imprisonment also support equitable tolling. Petitioner was unrepresented, indigent and imprisoned from the time that his first state post-conviction proceedings were completed in 1992 until after he filed his pro se PCRA petition in 1996. The Court of Common Pleas appointed counsel to represent him in the PCRA proceedings, but counsel withdrew when the Court of Common Pleas denied relief. Petitioner then continued pro se through Pennsylvania's Superior and Supreme Courts, and filed pro se in the District Court.[28] These circumstances – where an indigent, imprisoned, unrepresented petitioner diligently tried to present his claims in the face of confusing law – support equitable tolling.[29]

4. As the District Court found, Petitioner's "extremely grave" and "severe" sentence (life-without-possibility-of-parole imposed on a 17 year old) also supports equitable tolling. Pace-1 at 595; Pace-2 at *13.[30]

---

have been dismissed, and he would be in exactly the same posture he is in now – in need of tolling.

[28] The District Court first appointed counsel to represent Petitioner after the Commonwealth sought reconsideration of the Pace-1 District Court ruling.

[29] Estelle v. Gamble, 429 U.S. 97, 106 (1976) (pro se litigant "held to less stringent standards"); United States v. Miller, 197 F.3d 644, 650-51 (3d Cir. 1999) (habeas courts should be "pro-se-petitioner-friendly"; should be careful to protect pro se prisoners from AEDPA's "trap[s] for unwary petitioners"; and, in support of these goals, should require that AEDPA's "statute of limitations ... be tolled, as fairness demands"), cited with approval in Castro v. United States, 124 S.Ct. 786, 792 (2003); Kocian v. Getty Refining & Marketing Co., 707 F.2d 748, 755 (3d Cir. 1983) ("equitable tolling is particularly appropriate in cases involving lay persons" and "complex[]" procedures (citations omitted)); Hart v. J.T. Baker Chemical Co., 598 F.2d 829, 832 (3d Cir. 1979) (courts should be "flexible ... when reviewing failures by [pro se litigants] to comply with procedural technicalities"); see also Commonwealth v. Smith, 818 A.2d 494, 501 (Pa. 2003) (unrepresented prisoners may "not know of the necessity of demonstrating the existence of an exception to the [PCRA] time-bar" because, inter alia, the PCRA form petition provided to them, and which they are "required to fill out, does not reference the PCRA's time limitation").

[30] See Solem v. Helm, 463 U.S. 277, 297 (1983) (life without parole "is far more severe" than life with parole; "[o]nly capital punishment ... exceeds it" in severity); Joseph Bancroft & Sons Co. v. Shelley Knitting Mills, Inc., 268 F.2d 569, 574 (3d Cir. 1959) (equitable powers guided by severity of "possible injuries" to parties).

5. Equitable tolling is also appropriate because the Commonwealth misled Petitioner about the PCRA time-bar. The Commonwealth gives prisoners a standard PCRA form petition; unrepresented prisoners, at least those, like Petitioner, whose convictions are in Philadelphia, must use this form to file a pro se PCRA petition. Commonwealth v. Duffey, 713 A.2d 63, 66 (Pa. 1998); Smith, 818 A.2d at 501. When the PCRA was amended in January 1996, and the time-limits were added to the statute, the form that is provided to prisoners was not changed to reflect the amendments. Smith, 818 A.2d at 501; Commonwealth v. Palmer, 814 A.2d 700, 702 nn.2-3 (Pa. Super. 2002). In particular, the "standard PCRA petition form that is extensively used by inmates in Philadelphia, and which [Philadelphia-convicted prisoners] w[ere] required to fill out, does not reference the PCRA's time limitation mandate." Smith, 818 A.2d at 501. The Commonwealth, by providing this form to prisoners and requiring them to use it, thus misled them into believing that they might not have to comply with the PCRA time limits, thus supporting equitable tolling.[31]

6. Equitable tolling is particularly appropriate here, where failure to toll results in complete denial of all federal habeas review. Because habeas corpus is the "highest safeguard of liberty," Lonchar, 517 U.S. at 322, and "plays a vital role in protecting constitutional rights," Slack, 529 U.S. at 483, "it is particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair." Lonchar at 330. Here, where it was not clear that the state courts would ultimately deem Petitioner's claims untimely and where Third Circuit exhaustion law required Petitioner to seek state court review before filing a federal habeas petition, AEDPA's

---

[31] E.g., Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) (equitable tolling where "defendant lulled the plaintiff into inaction"); Miller v. Beneficial Management Corp., 977 F.2d 834, 845 (3d Cir. 1992) (equitable tolling where defendant's "acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights"); Miklavic v. USAir, Inc., 21 F.3d 551, 557 (3d Cir. 1994) (defendant's conduct which "lulled the [plaintiff] into a false sense of security" may be grounds for equitable tolling); Gray v. Phillips Petroleum Co., 858 F.2d 610, 615-16 (10th Cir. 1988) (equitable tolling where "plaintiff has been lulled into inaction by [the defendant], state or federal agencies, or the courts" (citations omitted)).

limitations period should be tolled.

7. As the District Court found, under these circumstances the Third Circuit's denial of any tolling, and the resulting loss of any federal review, is "an extraordinary deprivation of rights" and "patently unfair." Pace-1 at 594-95. Equitable tolling should be allowed.

CONCLUSION

For the reasons stated above this Court should grant the writ and review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

BILLY H. NOLAS, ESQ.
Assistant Federal Defender
MAUREEN KEARNEY ROWLEY, ESQ.
Chief Federal Defender
Defender Association of Philadelphia
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

Counsel for Petitioner, John Pace

Dated: March 4, 2004

CERTIFICATE OF SERVICE

I, BILLY H. NOLAS, certify that on this 4th day of March, 2004, I have caused the foregoing petition to be served by FIRST CLASS MAIL on the following person:

Thomas Dolgenos
Office of the Philadelphia District Attorney
1421 Arch Street
Philadelphia, Pennsylvania, 19102

BILLY H. NOLAS

H

This case was not selected for publication in the Federal Reporter.

NOT PRECEDENTIAL

Please use FIND to look at the applicable circuit court rule before citing this opinion. Third Circuit Local Appellate Rule 28.3(a) and Internal Operating Procedure 5.3. (FIND CTA3 Rule 28.0 and CTA3 IOP APP I 5.3.)

United States Court of Appeals,
Third Circuit.

John A. **PACE**
v.
Donald **VAUGHN**; the District Attorney of the County of Philadelphia; the Attorney General of the State of Pennsylvania,
Appellants

No. 02-3049.

Submitted Under Third Circuit LAR 34.1(a) July 7, 2003.
Decided July 30, 2003.

State prisoner who was convicted of murder petitioned for writ of habeas corpus. The United States District Court for the Eastern District of Pennsylvania, 151 F.Supp.2d 586, rejected report and recommendation of United States Magistrate that the petition be dismissed as time-barred, finding instead that the federal habeas limitations period was statutorily and equitably tolled. The state appealed. The Court of Appeals, Nygaard, Circuit Judge, held that: (1) petitioner's state postconviction relief petition was not properly filed as required to statutorily toll the federal habeas limitations period, and (2) uncertainty under state law as to the time limit for filing a state postconviction relief petition was not an extraordinary circumstance so as to warrant equitable tolling of the federal habeas limitations period, in the case of a mandatory life sentence without the possibility of parole.

Reversed.

West Headnotes

[1] Habeas Corpus ⇐603
197k603

Federal habeas court was bound by state court's finding that state postconviction relief petitioner's second state postconviction relief petition was untimely, and thus, petitioner's state petition was not properly filed as required to statutorily toll the federal habeas limitations period. 28 U.S.C.A. § 2244(d)(2).

[2] Habeas Corpus ⇐603
197k603

Uncertainty under state law as to the time limit for filing a state postconviction relief petition was not an extraordinary circumstance so as to warrant equitable tolling of the federal habeas limitations period, in the case of a mandatory life sentence without the possibility of parole, especially where petitioner did not act promptly after state law as to the time bar for postconviction relief became clear. 28 U.S.C.A. § 2244(d).

***128** On Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. Civil No. 99-cv-06568). District Judge: The Honorable James T. Giles.

Before NYGAARD, SMITH, and GREENBERG, Circuit Judges.

OPINION OF THE COURT

NYGAARD, Circuit Judge.

****1** In this case, the Commonwealth of Pennsylvania argues that the District Court erred by both statutorily and equitably tolling the statute of limitations for the federal habeas corpus petition of appellee John Pace under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d)(2), during the period of time Pace was pursuing post conviction relief in state court under the Pennsylvania Post Conviction Relief Act, 42 Pa. Cons.Stat. Ann. §§ 9541-9546 (1998) (PCRA). At issue is whether Pace's application for state post-conviction relief was "properly filed" under 28 U.S.C. § 2244(d)(2). We hold that our recent case, *Merritt v. Blaine*, 326 F.3d 157 (3d Cir.2003), controls the analysis here, and because we find that the application was not properly filed and that equitable tolling was not justified, we will reverse the District Court.

I.

The one-year limitation of the AEDPA is statutorily tolled for the "time during which a properly filed

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Pace's petition was statutorily tolled only if his petition for state post-conviction review was both pending and "properly filed." *Merritt*, 326 F.3d at 162. In *Merritt*, which was decided after Judge Giles issued his opinion, we analyzed our decision in *Fahy v. Horn*, 240 F.3d 239 (3d Cir.2001):

> We held in *Fahy* that an untimely PCRA petition does not toll the statute of limitations for a federal habeas corpus petition.... In *Fahy*, we noted that when applying AEDPA, 'we must look to state law governing when a petition for collateral relief is properly filed' and 'defer to a state's highest court when it rules on an issue.' Consequently, just as in *Fahy*, we must defer to the state court's holding that Merritt's PCRA petition was untimely and it follows that it was not 'properly filed' under AEDPA.

Id. at 165-66 (citations omitted). Because the highest state court had held that Merritt's PCRA petition was untimely, it was not "properly filed" under AEDPA.

[1] We do not see any material distinctions between our treatment of Merritt's *pro se* second PCRA petition and Pace's. We are therefore bound by the state court's finding that Pace's second PCRA petition was untimely, and we must reverse the District Court's order holding that Pace's second PCRA petition was tolled by the statute.

II.

The general requirements for equitable tolling are that (1) the petitioner has established that he has been prevented from ***129** asserting his rights "in some extraordinary way," and (2) the petitioner has demonstrated that he "exercised reasonable diligence in investigating and bringing [the] claims." *Id.* at 168 (citations omitted).

[2] The Commonwealth contends that, contrary to the determination of the District Court, the lack of certainty as to how Pennsylvania courts would interpret the PCRA is not an "extraordinary" circumstance. We agree. In *Merritt*, we explained:

> ****2** We recognized that in 1997, when Fahy's PCRA petition was filed, the newly established PCRA time limit was 'unclear' and 'inhibitively opaque.' Indeed, we stated that based on that uncertainty, Fahy 'reasonably believed that the state petition was properly filed.' However ... in *Fahy* we 'did not hold that this lack of clarity in Pennsylvania law constituted extraordinary circumstances.' In fact, we stated that 'in non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling.' Instead of finding extraordinary circumstances, we based our decision to apply equitable tolling in *Fahy* on the accepted principle that 'death is different.' ... This case is similar to *Fahy*.... [I]t was not unreasonable (indeed it was appropriate) for Merritt to have believed he was required to exhaust his state remedies by filing a second PCRA petition prior to filing a habeas petition in federal court.... Although Merritt faces the grave penalty of mandatory life sentence without the possibility of parole, we cannot apply the rationale of *Fahy* to Merritt's situation without violating our tradition of avoiding intracircuit conflict of precedent.

Merritt, 326 F.3d at 169-70 (citations omitted). *Merritt* established that the uncertain PCRA time limit is not an "extraordinary" circumstance in the case of mandatory life sentence without the possibility of parole. In addition, the *Merritt* panel held that because Merritt did not act promptly after the decisions of the Pennsylvania Superior Court in 1997, [FN1] at which point "Pennsylvania law as to the time bar of the PCRA became clear," there was no basis to find Merritt's habeas petition timely under the doctrine of equitable estoppel. This case is on all fours with *Merritt*. We therefore conclude that there are no extraordinary circumstances that would allow for equitable tolling.

FN1. *See Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa.Super.Ct.1997); *Commonwealth v. Conway*, 706 A.2d 1243 (Pa.Super.Ct.1997).

III.

In conclusion, we hold that there is no basis to find Pace's habeas petition timely, either under the statute or under the doctrine of equitable estoppel. Indeed, Pace himself concedes that "*Merritt* is materially indistinguishable from *Pace* and, thus, *Merritt*' s denial of both statutory and equitable tolling would apply here." Appellee's Supp. Br. Re: *Merritt*, at 1. Based on the foregoing, we will reverse the District Court, and dismiss Pace's petition for habeas corpus as time-barred under the AEDPA.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

71 Fed.Appx. 127, 2003 WL 21754982 (3rd Cir.(Pa.))

END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3049

JOHN A. PACE

v.

DONALD VAUGHN; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA;
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Appellants

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Dist. Ct. No. 99-cv-06568)

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, Chief Judge,
SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, BARRY,
AMBRO, FUENTES, SMITH, CHERTOFF, and GREENBERG, Circuit Judges[1]

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is

---

[1]Judge Greenberg's vote is limited to panel rehearing only.

Sincerely: BN, DW, JG

hereby DENIED.

It is so ordered.

By the Court,

United States Circuit Judge

DATE: OCT -6 2003

United States District Court,
E.D. Pennsylvania.

John A. **PACE**
v.
Donald **VAUGHN**, et al.

No. CIV.A. 99-6568.

June 7, 2001.

Following conviction for possession of instrument of crime and second-degree murder, inmate filed two petitions for post-conviction relief under state law, and later filed federal habeas petition. United States Magistrate Judge M. Faith Angell recommended that the petition be dismissed as time-barred under the Antiterrorism and Effective Death Penalty Act (AEDPA), and inmate objected to report and recommendation. The District Court, Giles, Chief Judge, held that: (1) Pennsylvania Post Conviction Relief Act (PCRA) petition for post- conviction relief was "properly filed," and thus, tolled AEDPA's statute of limitations, where state petition abided by all of Pennsylvania's clear and well established procedural requirements at time it was filed, even though state law was subsequently established that resulted in state court dismissing the petition as time-barred, and (2) AEDPA statute of limitations could be equitably tolled under the circumstances.

So ordered.

West Headnotes

[1] Habeas Corpus ⇐603
197k603

Pennsylvania Post Conviction Relief Act (PCRA) petition for post-conviction relief was "properly filed," and thus, tolled the federal Antiterrorism and Effective Death Penalty Act's (AEDPA's) statute of limitations for filing a federal habeas petition, where state petition abided by all of Pennsylvania's clear and well established procedural requirements at time it was filed, even though state law was subsequently established that resulted in state court dismissing the petition as time-barred. 28 U.S.C.A. § 2244(d)(1); 42 Pa.C.S.A. § 9545.

[2] Habeas Corpus ⇐603
197k603

Antiterrorism and Effective Death Penalty Act's (AEDPA's) statute of limitations is tolled while a "properly filed" post-collateral relief petition is pending in state court; in this regard, application is "filed" when it is delivered to, and accepted by, the appropriate court officer for placement into the official record, and application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings, which typically prescribe such things as the form of the document, time limits upon its delivery, court and office in which it must be lodged, and the filing fee. 28 U.S.C.A. § 2244(d)(1).

[3] Habeas Corpus ⇐603
197k603

Pennsylvania Post Conviction Relief Act (PCRA) petition is "properly filed" in Pennsylvania, for purposes of tolling Antiterrorism and Effective Death Penalty Act's (AEDPA's) statute of limitations, when it is delivered and accepted in accordance with applicable Pennsylvania laws and rules. 28 U.S.C.A. § 2244(d)(1); 42 Pa.C.S.A. § 9545.

[4] Habeas Corpus ⇐603
197k603

If state allows petitioners to file second or subsequent petitions for post- conviction relief, federal courts should not undermine state's decision by refusing to toll the one-year period of limitation of the Antiterrorism and Effective Death Penalty Act (AEDPA) if a second or subsequent petition is pending in the state court system. 28 U.S.C.A. § 2244(d)(1).

[5] Habeas Corpus ⇐603
197k603

State prisoner was entitled to tolling of statute of limitations under the Antiterrorism and Effective Death Penalty Act (AEDPA) with regard to his federal habeas petition, where his state petition was filed at time when a habeas petition, if filed in federal court, would have been dismissed for failure to exhaust state remedies. 28 U.S.C.A. § 2244(d)(1).

[6] Habeas Corpus ⇐603
197k603

State inmate was entitled to equitable tolling of one-year statute of limitations under the Antiterrorism and

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Effective Death Penalty Act (AEDPA), even if he did not timely file his federal habeas petition, where strict adherence to statute of limitations would be unfair, in that inmate exercised reasonable diligence in bringing his claims, and if he would have filed federal petition timely, it would have been dismissed for failure to exhaust state remedies, given that his Pennsylvania Post Conviction Relief Act (PCRA) petition was still pending at that time. 28 U.S.C.A. § 2244(d)(1); 42 Pa.C.S.A. § 9545.

***587** John A. Pace, Graterford, PA, Pro se.

Thomas W. Dolgenos, District Attorney's Office, Donna G. Zucker, John W. Goldsborough, Office of the District Attorney, Assistant District Attorney, Philadelphia, PA, for Respondents.

Memorandum

GILES, Chief Judge.

Factual and Procedural History

I. Petitioner's Requests for Collateral Relief.

On February 13, 1986, Petitioner pled guilty before the Honorable David N. Savitt of the Court of Common Pleas of Philadelphia County to the charges of possession of an instrument of crime and the second-degree murder of Randolph Baldwin. Judge Savitt sentenced Petitioner, who was then seventeen years old, to life imprisonment without the possibility of parole. Petitioner did not file a motion to withdraw his guilty plea, and he did not file a direct appeal.

However, six months later on August 21, 1986, Petitioner filed a *pro se* petition under the Pennsylvania Post Conviction Hearing Act ["PCHA"], 42 Pa.C.S.A § 9541, *et seq.* Through appointed counsel, Petitioner eventually filed an amended petition claiming both ineffective assistance of trial counsel and trial court error. The Commonwealth moved to dismiss the amended PCHA petition. The PCHA court granted that motion on July 23, 1991. On March 30, 1992, the Superior Court affirmed the PCHA court's decision. The Supreme Court of Pennsylvania denied Allocatur on September 2, 1992.

On November 27, 1996, Petitioner filed a second request for collateral relief under the Pennsylvania Post Conviction Relief Act ["PCRA"], which replaced the PCHA in 1988. When Petitioner filed the PCRA petition, the Act had recently been amended. The amendments, which were enacted on January 16, 1996, placed new time limits on PCRA petitions. The relevant part of the limitation follows:

> (b) Time for filing petition.--
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
> (i) the failure to raise the claim previously was the result of interference by ***588** government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S.A. § 9545.

II. The Timeliness of the Petitioner's PCRA Petition was Uncertain Based on the Statutory Language and Legislative Note.

Section 9545 of the PCRA states that a petition must be filed within one year of the date that a petitioner's conviction became final, unless the petition falls within one of the enumerated exceptions. At the time Petitioner filed his PCRA petition in November 1996, his conviction had become final over ten years before, and his petition did not claim any of the statutory exceptions to the one year time limit. Since Petitioner's conviction occurred prior to the enactment of the PCRA amendments, it could not have been clear how, if at all, the amendments would apply to the petition when it was filed in November, 1996. The 1995 PCRA amendments had been accompanied by a Note about legislative intent. It stated that "a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under 42 Pa.C.S. Ch. 95 Subch. B if the petitioner's first petition is filed within one year of the effective date of the act." The Note did not clarify whether petitioners with pre-1996 final convictions, who filed second or successive petitions, but who were filing their first petition since the amendment, had one year after the enactment of the act to file a collateral relief petition.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

III. Opinions from Federal District Courts Reflected the Fact that the Timeliness of Petitioner's PCRA Petition was Uncertain when it was Filed.

When Petitioner filed his PCRA petition in November 1996, it was not then known how the Pennsylvania state courts would apply the above quoted provision. No Pennsylvania state court opinion had been rendered interpreting it. As of September 1997, the third circuit found that it was still not clear how Pennsylvania courts would interpret amendments to the PCRA. Specifically, in *Banks v. Horn*, the court noted that:

> While it is true that the text of the 1995 PCRA amendments supports these contentions [that the 1995 amendments bar a second collateral relief petition filed more than one year after a conviction], it is not clear that these amendments are dispositive. The Commonwealth does not refer us to a single case applying the PCRA as amended in 1995 to support its views. Furthermore, in [*Commonwealth v.*] *Szuchon*[, 534 Pa. 483, 633 A.2d 1098 (1993)] and [*Commonwealth v.*] *Beasley*[, 544 Pa. 554, 678 A.2d 773 (1996)] the Pennsylvania Supreme court addresses the merits of claims which seemingly were precluded by the PCRA provisions then in force.

126 F.3d at 214. *Banks* was a death penalty case, and the *Szuchon* and *Beasley* were both death penalty cases. Further, the *Banks* opinion notes that "the Pennsylvania ***589** Supreme Court does not apply Pennsylvania procedural bar rules consistently in death penalty cases." 126 F.3d at 213. However, the *Banks* opinion explicitly extends its reasoning beyond death penalty cases. The opinion states:

> It is, of course, possible in death penalty cases (and other cases as well) that future experience will show that the Pennsylvania Supreme Court consistently and regularly applies the 1995 amendments to the PCRA and thereby creates a procedural bar sufficient to satisfy the standard of *Johnson v. Mississippi*[, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988)]. That time, however, has not yet been reached.

126 F.3d at 214 n. 3. (citation omitted).

Trial courts in this district also noted that the ambiguity of the 1995 PCRA amendments extended to non-capital cases. *See Hammock v. Vaughan*, 1998 WL 163194, at *6 (E.D.Pa. April 7, 1998) ("The possibility exists, therefore, that...the statute of limitations bar will be waived by Pennsylvania courts in some cases. There is thus a lack of certainty with respect to state application of this procedural bar.."); *Peterson v. Brennan*, 1998 WL 470139, at *6 (E.D.Pa. August 11, 1998) (same).

Eventually, Pennsylvania state courts did interpret the 1995 PCRA amendments and held that the 1995 amendments were jurisdictional and would be adhered to strictly. *See Commonwealth v. Banks*, 556 Pa. 1, 726 A.2d 374, 375-76 (1999). Further, the 1995 PCRA amendments prohibited all second collateral relief petitions filed more than one year after a conviction became final, regardless of if the first petition was filed prior to the enactment of the 1995 PCRA amendments. *See id.* A recent federal district court case noted that the ambiguity related to the force of the 1995 PCRA amendments has only recently been remedied. *See Holman v. Gillis*, 58 F.Supp.2d 587, 594-96 (1999) ("In light of the mandate by the Pennsylvania Supreme Court...since December 1998, the court finds...that it can now be said with confidence that the Pennsylvania Supreme Court has consistently and regularly applied the 1995 amendments to the PCRA, namely, the one-year statute of limitations, as a procedural bar to all untimely PCRA petitions that do not qualify for any of the three exceptions.").

IV. Court Proceedings.

Indeed, the uncertainty about the force of the 1995 PCRA amendments extended to Pennsylvania state courts. On June 23, 1997, for example, the PCRA court did not dismiss Petitioner's PCRA petition as time barred. Rather, it denied the petition on its merits. Petitioner appealed.

Seven months after the dismissal of Petitioner's petition, the Superior Court of Pennsylvania issued the first state appellate court decision interpreting the recent amendments to the PCRA. *See Commonwealth v. Alcorn*, 703 A.2d 1054, 1056 (Pa.Super.Ct.1997) ("Our research indicated no prior decisions interpreting this section [42 Pa.C.S. § 9545]; therefore its applicability to this case presents a question of first impression."). The Superior Court in *Alcorn* held that the 1995 amendments to the PCRA disallowed second or successive petitions filed more than one year after the underlying conviction became final, even if the conviction became final, and the first petition was filed, before the enactment of the 1996 amendments. *Alcorn*, 703 A.2d at 1056-57.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

The Commonwealth then wrote a letter brief to the Superior Court concerning the pending appeal of Petitioner's PCRA petition. The brief argued that based on *Alcorn* the petition should be dismissed as time-barred. The Superior Court agreed ***590** and, on December 4, 1998, dismissed the petition as time-barred. Petitioner requested re-argument of the case, stating for the first time in a motion that prison officials had wrongfully withheld legal documents, and that that conduct entitled him to an exception to the PCRA's new statute of limitations pursuant to 42 Pa.C.S.A. § 9545(b)(1)(i). The Superior Court denied his request for re-argument without stating reasons. Petitioner appealed to the Supreme Court of Pennsylvania. Allocatur was declined by the Supreme Court on July 29, 1999.

On December 27, 1999, petitioner filed the instant federal *habeas* petition *pro se*. His petition included claims, among others, that 1) neither his state trial court judge nor his attorney properly informed him that his original life sentence expressly precluded the possibility of parole, and 2) that his sentence was given pursuant to a Pennsylvania statute which was inconsistent with other Pennsylvania statutes, in violation of Due Process Clause of the U.S. Constitution. The petition was referred to United States Magistrate Judge M. Faith Angell for a report and recommendation.

Judge Angell recommended that the petition be dismissed as time-barred because the Antiterrorism and Effective Death Penalty Act ("AEDPA") includes a statute of limitations that requires that habeas petitions be filed within one year of the date that a petitioner's conviction becomes final. *See* 28 U.S.C. § 2244(d)(1). Judge Angell accurately noted that petitioners whose convictions became final before the enactment of AEDPA's statute of limitations on April 24, 1996 have until one year from the enactment of the habeas statute of limitations to file their petitions. *See Burns v. Morton*, 134 F.3d 109, 111 (3d Cir.1998). Under this reasoning, Petitioner had only until April 23, 1997 to file his federal habeas petition; his petition had been filed two and a half years after this deadline. Section 2244(d)(2) of Title 28 states that a "properly filed" pending petition for state collateral relief tolls the statute of limitations for federal habeas purposes. Judge Angell reasoned that Petitioner's state collateral relief petition was not "properly filed," and, thus, did not toll AEDPA's statute of limitations.

The third circuit has determined that a "properly filed" state collateral relief petition is "one submitted according to the state's procedural requirements, such as the rules governing time and place of filing." *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir.1998). When Petitioner filed his state court petition, it was unclear as a matter of state law if his state petition would be time-barred. Once the Pennsylvania state courts delineated the new time limits of the PCRA, a Pennsylvania Superior Court dismissed Petitioner's PCRA petition as time-barred. Judge Angell concluded that a petition ultimately dismissed as time-barred by a Pennsylvania appeals court was not "submitted according to the state's procedural requirements" and thus, was not "properly filed" for the purpose of tolling the federal habeas statute. Since Petitioner had no "properly filed" state petition pending since the enactment of AEDPA, Judge Angell recommended that Petitioner's federal habeas petition should be dismissed because it was filed well after the statute of limitations period for filing a federal habeas petition.

Petitioner filed an objection to the Magistrate Judge's report and recommendation claiming that his state court petition should have tolled AEDPA's statute of limitation either because his state court petition was "properly filed" or because this court should apply "equitable tolling" pursuant to the third circuit's opinion in *Miller v. New Jersey Department of Corrections*, 145 F.3d 616 (3d Cir.1998). The ***591** United States responded to Petitioner's Objection. After review of the applicable case law, this court concludes that the petition was "properly filed" for purposes of tolling the federal habeas statute of limitations, and even if it was not properly filed, Petitioner was entitled to equitable tolling while his state court petition was pending.

Discussion

I. The PCRA Petition was Properly Filed and Tolled AEDPA's Statute of Limitations Because it Abided by all of Pennsylvania's Clear and Well Established Procedural Requirements.

[1][2][3] AEDPA's statute of limitation is tolled while a "properly filed" post-collateral relief petition is pending in state court. Last term, the United States Supreme Court defined a "properly filed" petition as follows:

> An application is "filed," as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. *See, e.g., United States v. Lombardo*, 241 U.S. 73, 76, 36 S.Ct. 508, 60 L.Ed. 897 (1916) ("A paper is filed when it is delivered to the proper official and by him received and filed"); Black's Law Dictionary 642 (7th ed.1999) (defining "file" as "[t]o deliver a legal document to the court clerk or record custodian for placement into the official record"). And an application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. *See, e.g., Habteselassie v. Novak*, 209 F.3d 1208, 1210-1211 (10th Cir.2000); [*Bennett v. Artuz*,] 199 F.3d, [116] at 121 [(2nd Cir.1999)] (case below); *Villegas v. Johnson*, 184 F.3d 467, 469-470 (5th Cir.1999); *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir.1998).

Artuz v. Bennett, 531 U.S. 4, 121 S.Ct. 361, 363-64, 148 L.Ed.2d 213 (2000).

Previously, the third circuit had defined a "properly filed" PCRA petition as follows:

> We believe that "a properly filed application" is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing. A Pennsylvania PCRA petitioner, for example, must file a motion with the clerk of the court in which he was convicted and sentenced, Pa. R.Crim. P. 1501, generally within one year of the date the judgment becomes final, 42 Pa. Cons.Stat. Ann. § 9545(b)(1). If a petitioner complies with these procedural requirements, or other procedural requirements the state imposes, his petition, even a second or successive petition, is "a properly filed application" for purposes of § 2244(d)(2). While we recognize that the Pennsylvania Supreme Court has announced strict rules regarding the granting of second and subsequent PCRA petitions, *see Commonwealth v. Lawson*, 519 Pa. 504, 549 A.2d 107 (1988), Pennsylvania allows for the filing of second or subsequent PCRA petitions, *see* 42 Pa. Cons.Stat. Ann. § 9545(b)(1), and courts occasionally grant relief in such proceedings, *see e.g., Commonwealth v. Morales*, 549 Pa. 400, 701 A.2d 516 (1997).

Lovasz v. Vaughn, 134 F.3d 146, 148-149 (3d Cir.1998). Thus, it is now fair to conclude that a PCRA petition is properly filed in Pennsylvania for purposes of tolling AEDPA's statute of limitations when it is delivered and accepted in accordance with applicable Pennsylvania laws and ***592** rules. Petitioner's PCRA petition was delivered and accepted in accordance with applicable Pennsylvania laws and rules. The PCRA court accepted Petitioner's application for filing and ruled on its merits. The fact that state law was subsequently established that resulted in the Superior Court of Pennsylvania dismissing the petition as time-barred does not alter this essential fact.

The United States Supreme Court has listed the types of requisite procedural requirements, among them timeliness, that warrant a state collateral relief petition being considered "properly filed." These include the forms used, the office to which the form is sent, and payment of the relevant filing fee. *See Artuz*, 121 S.Ct. at 364. Similarly, the third circuit has noted that, in addition to the timeliness of the petition, a PCRA petition must be filed with the same court in which the petitioner was sentenced in order to be properly filed. *See Lovasz*, 134 F.3d at 148. These examples show that the "properly filed" requirement is meant to disallow tolling only when state petitions fail to comply with clear and well established procedural requirements. *See Emerson v. Johnson*, 243 F.3d 931, 934 (5th Cir.2001) ("Although we might have read [the state statute] to prohibit Emerson's suggestion for reconsideration, given Texas case law, as well as the *Artuz* Court's broad reading of the phrase 'properly filed,' we must conclude Emerson 'properly filed' his suggestion for reconsideration."); *Hardy v. Secretary for the Dept. of Corrections*, 246 F.3d 1300, 1302 (11th Cir.2001) (suggesting "properly filed" under *Artuz* means "conform[ing] with Florida's basic procedural rules"). Therefore, Petitioner's PCRA petition was proper for federal habeas purposes given the state of the law at the time his petition was filed.

II. Third Circuit Precedent Supports Defining a Properly Filed Petition as One that Comports with Clear and Well Established State Procedural Requirements.

[4][5] The third circuit's interpretation of the term "properly filed" in 28 U.S.C. § 2244(d)(2) requires that state collateral relief petitions that have complied with all clear and established state law procedural requirements toll AEDPA's statute of limitations.

In *Lovasz*, the third circuit stated:

> We have yet to consider what constitutes "a properly filed application" to trigger the tolling mechanism of § 2244(d)(2). Principles of comity

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

inform our decision. In our federal system, "the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 2555, 115 L.Ed.2d 640 (1991). Such respect for the states has given rise to the well-established rule that a federal court should not find a state prisoner's claims procedurally barred from federal habeas review unless state law "clearly foreclose[s]" review of the claims. *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir.1993); *see Banks v. Horn*, 126 F.3d 206, 211 (3d Cir.1997); *Doctor v. Walters*, 96 F.3d 675, 683 (3d Cir.1996). Moreover, in enacting AEDPA, of which § 2244(d) is a part, Congress intended to "reduce federal intrusion into state criminal proceedings." *Banks*, 126 F.3d at 213. Thus, if a state allows petitioners to file second or subsequent petitions for post-conviction relief, federal courts should not undermine the state's decision by refusing to toll the one-year period of limitation of § 2244(d)(1) where a second or subsequent petition is pending in the state court system. Nor should we discourage ***593** petitioners from exhausting all their claims in state court, even by means of a second or subsequent petition for post-conviction relief where permissible under state law, before seeking habeas review in federal court.

Lovasz, 134 F.3d at 148.

Federal courts must give state courts the first opportunity to correct their alleged errors. Tolling AEDPA's statute of limitations whenever petitioners have complied with all the state courts' clear and established procedural rules squares with the requirement of allowing a state the first opportunity to correct alleged violations of federal rights. A petitioner will be discouraged from filing in state court if it is believed that there is a possibility that the opportunity to bring a federal habeas petition will be lost should the state court end up finding that the state petition is procedurally barred. *See Swartz v. Meyers*, 204 F.3d 417, 419 (3d Cir.2000); *Emerson*, 243 F.3d at 935.

The third circuit has held that "in the absence of a state court decision indicating that a habeas corpus petitioner is clearly precluded from relief, the district court should dismiss the claim for failure to exhaust even if it is not likely that the state court will consider petitioner's claim on the merits." *Banks v. Horn*, 126 F.3d 206, 211 (3d Cir.1997). *See also Lines v. Larkins*, 208 F.3d 153, 163 (3d Cir.2000) (noting petitions should be dismissed for failure to exhaust even it is "unlikely that further state process is available"); *Lambert v. Blackwell*, 134 F.3d 506, 517-18 (3d Cir.1997). Thus, the third circuit requires that petitioners exhaust in state court whenever a petitioner is not clearly precluded from relief on state procedural grounds, even if it is very likely, though not certain, that the petition will be dismissed in state court on procedural grounds. It follows that when petitioners file petitions in state court that are not clearly foreclosed by state procedural law, the petitions must be considered properly filed and toll AEDPA's statute of limitations. The third circuit took this position when it determined AEDPA's statute of limitation would toll while the time to file a state appeal of the denial of a PCRA petition was running, even if the petitioner did not file such an appeal. Specifically, the court stated that its decision to toll AEDPA during the time allowed for an appeal of a state court decision

> finds support in the principle of state-remedy exhaustion. In *Mills v. Norris*, 187 F.3d 881 (8th Cir.1999), the Court of Appeals for the Eighth Circuit applied the principle of exhaustion to a somewhat similar factual scenario. Mills had filed a petition for post-conviction relief before the enactment of AEDPA. On August 15, 1996, the trial court denied his petition. Four days later Mills filed a notice of appeal with the Arkansas Supreme Court, but failed to file the record on appeal within the requisite ninety days as provided by Arkansas' procedural rules. The Arkansas Supreme Court took no action on the appeal. Then, on October 9, 1997, Mills filed a federal habeas petition. The issue before the Eighth Circuit was, in light of Mills' failure to perfect his appeal, on what date did his post-conviction relief motion cease "pending." See *id.* at 882, 884.
>
> Mills argued that the period was tolled until the end of the 90 days to perfect his appeal. The State argued that the appeal was not pending because Mills failed to timely file the record on appeal as required by the appellate rules. After reviewing the principles of exhaustion and comity, the court concluded:
>
> ***594** In this case, if Mills had filed his federal petition during the ninety days following the filing of his notice to appeal to the Supreme Court of Arkansas, the federal petition would surely have been dismissed for failure to exhaust state remedies, because there was still time to perfect his state appeal by filing the record with the Clerk of the Arkansas Supreme Court. That being so, we conclude the state postconviction appeal was "pending" for purposes of § 2244(d)(2) until at least November 17, 1996, the end of that ninety-day period. Thus, Mills timely filed his federal habeas petition on October 9, 1997.
>
> *Id.* at 884.
>
> We find these reasons convincing. If Swartz had attempted to seek federal habeas corpus relief while there was still time to seek allowance of appeal, the petition would automatically be dismissed for failure to exhaust state remedies.

Swartz, 204 F.3d at 422.

Similarly, the Petitioner is entitled to a tolling of AEDPA's statute of limitations since his state petition was filed at a time when a habeas petition, if filed in federal court, would have been dismissed. *See* Part IIIB, infra. Therefore, this court holds that Petitioner's state court petition tolled AEDPA's statute of limitations and that the federal habeas petition must now be considered on its merits.

III. The Statute of Limitations Equitably Tolled While the PCRA Petition was Pending.

A. Equitable Tolling Is Allowed in Extraordinary Circumstance.

[6] Petitioner is also entitled to equitable tolling to the extent that he did not file his federal habeas petition timely. The third circuit has allowed exceptions to AEDPA's one year statute of limitations where strict adherence to the statute of limitations would be unfair. In *Miller v. New Jersey Department of Corrections*, 145 F.3d 616 (1998), the court stated that

> For guidance of the district court, we observe that equitable tolling is proper only when the "principles of equity would make [the] rigid application [of a limitation period] unfair." Generally, this will occur when the petitioner has "in some extraordinary way...been prevented from asserting his or her rights." The petitioner must show that he or she "exercised reasonable diligence in investigating and bringing [the] claims." Mere excusable neglect is not sufficient.

145 F.3d at 618-619 (citations omitted) (brackets and ellipses in original). Here, Petitioner exercised reasonable diligence in bringing his claims and it would be unfair, and would rise to an extraordinary deprivation of rights, if under these circumstances he were barred by AEDPA's one year statute of limitations.

B. The Petitioner Would Not Have Been Able to File His Petition in Federal Court in 1996.

The Petitioner would not have been allowed to file a petition in federal court within one year of when AEDPA was enacted because the federal courts in this district would have refused to hear his federal claims because he had failed to exhaust his remedies in state court. As of September 1997, the third circuit stated that it was still not clear how Pennsylvania courts would interpret amendments to the PCRA and that federal courts should not hear petitions that were not brought in state court simply because they would be thought to be excluded by the 1995 amendments to the PCRA. *See Banks*, 126 F.3d at 211- 14. *See also Hammock v. Vaughan*, 1998 WL 163194, at ***6** (April 7, ***595** 1998) ("There is thus a lack of certainty with respect to state application of [the 1995 PCRA amendments.] This lack of certainty requires dismissal of the petition."); *Peterson*, 1998 WL 470139, at ***6** (August 11, 1998) (same). Only recently have the state courts interpreted the 1995 amendments to the PCRA conclusively enough that federal courts do not have to dismiss habeas petitions that seem to be barred by the text of the 1995 amendments. *See Lines v. Larkins*, 208 F.3d at 164 (3d Cir.2000) ("[I]t is now clear that the one year limitation applies to all PCRA petitions including a second petition, no matter when the first was filed."); *Holman v. Gillis*, 58 F.Supp.2d 587, 594-96 (E.D.Pa.1999).

C. AEDPA's Statute of Limitations Is Tolled Due To Pendency of Petitioner's 1996 PCRA Petition.

It would be patently unfair if the federal statute of limitations ran during the time in which Petitioner was not allowed to bring a federal petition. Accordingly, AEDPA's statute of limitations was equitably tolled while Petitioner's second PCRA petition was pending from November 27, 1996 to July 29, 1999.

Petitioner's sentence was life without the possibility of parole and was imposed when he was only seventeen years old. In applying equitable tolling in a capital case, the third circuit stated, "In a capital case such as this, the consequences of error are terminal, and we therefore pay particular attention to whether principles of 'equity would make rigid application of a limitation period unfair' and whether petitioner has 'exercised reasonable diligence in investigating and bringing [the] claims.' " *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir.2001) (citing *Miller*, 145 F.3d at 618).

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

The *Fahy* court went on to state, "We elect to exercise leniency under the facts of this capital case where there is no evidence of abuse of process." *Fahy*, 240 F.3d at 245. Similarly, this case calls for leniency since the consequence facing Petitioner, the certainty of spending age seventeen until his life ends in prison, is extremely grave. [FN1] Should the court not toll AEDPA's statute of limitations, then Petitioner will have to spend life in prison without being allowed federal review of his claims. *See Fahy*, 240 F.3d at 245. Accordingly, this court finds that extraordinary circumstances exist in this case and that AEDPA's one-year statute of limitations was equitably tolled while Petitioner's PCRA petition was pending.

> FN1. The Supreme Court has recognized the special gravity of life without the possibility of parole, noting that the sentence "is far more severe" than a life sentence and that only "capital punishment...exceeds it." *Solem v. Helm*, 463 U.S. 277, 297, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

Conclusion

This court finds that Petitioner was entitled to statutory tolling and equitable tolling while his PCRA petition was pending. Because Petitioner's conviction became final before the enactment of AEDPA, he had one year from April 24, 1996, excluding the period in which the statute equitably tolled, to file his federal habeas petition. *See Burns*, 134 F.3d at 111.

The federal statute of limitations ran from April 24, 1996 (the date of the enactment of AEDPA) to November 26, 1996 (the day before petitioner filed his PCRA petition) and from July 30, 1999 (the day after the Pennsylvania Supreme Court declined to review the Pennsylvania Superior Court denial of his PCRA petition) until late December, 1999 when Petitioner filed his federal habeas petition. Given the one year statute of limitations, Petitioner had until December 24, 1999 to file his federal ***596** habeas petition. Petitioner dated his federal habeas petition December 22, 1999. The clerk of the court marked Petitioner's petition as filed on December 27, 1999. The prison mailbox rule states that the petition is deemed filed when a prisoner gives his petition to prison officials. *See Burns*, 134 F.3d at 113. Since the Commonwealth does not argue otherwise, this court assumes Petitioner gave his petition to prison officials by December 24, 1999 making his federal habeas petition timely filed.

END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.

John A. PACE, Petitioner,
v.
Donald VAUGHN, et al., Respondent.

No. CIV.A. 99-6568.

March 29, 2002.

MEMORANDUM

GILES, C.J.

I. Introduction

***1** John A. Pace ("Mr. Pace"), a state prisoner who pled guilty to second- degree murder and possession of an instrument of crime, petitions for a writ of *habeas corpus* under 28 U.S.C. § 2254. This court had referred Mr. Pace's petition to United States Magistrate Judge M. Faith Angell for a Report and Recommendation. She recommended that the petition be dismissed as time-barred because the Antiterrorism and Effective Death Penalty Act ("AEDPA") includes a statute of limitations that requires that federal *habeas* petitions be filed within one year of the date that a petitioner's conviction becomes final in state court. *See* 28 U.S.C. § 2244(d)(1). The Recommendation accurately noted that petitioners whose convictions became final before the enactment of AEDPA's statute of limitations on April 24, 1996, have one year from that date to file their petitions. *See Burns v. Morton*, 134 F.3d 109, 111 (3d Cir.1998). It concluded that a petition ultimately dismissed as time-barred by a Pennsylvania appeals court was not submitted according to the state's procedural requirements, and thus, was not "properly filed" for purposes of tolling the federal *habeas* statute. (Report and Recommendation at 7.) The Recommendation reasoned that petitioner had only until April 23, 1997 to file his federal *habeas* petition. This § 2254 petition was filed by December 24, 1999 and was, therefore, seen as time-barred.

Petitioner filed objections to the Report and Recommendation claiming that his second state court petition, pursuant to the Pennsylvania Collateral Relief Act ("PCRA"), should have tolled AEDPA's statute of limitations either because his state court petition was "properly filed" or because this court should apply "equitable tolling" pursuant to the third circuit's opinion in *Miller v. New Jersey Dep't of Corrs.*, 145 F.3d 616 (3d Cir.1998). The Commonwealth of Pennsylvania responded, opposing the objections. In *Pace v. Vaughn*, 151 F.Supp.2d 586, 591 (E.D.Pa.2001), this court held that Mr. Pace's state court petition was "properly filed" for purposes of tolling the federal *habeas* statute of limitations, and that, even if it had not been "properly filed," petitioner was entitled to equitable tolling while his second state court PCRA petition was pending.

On June 22, 2001, the respondents moved for reconsideration or permission to appeal. Oral argument was heard on January 29, 2002. For the following reasons, the motion for reconsideration is denied and the motion for permission to appeal is granted.

II. Background

A. State Court Proceedings

On February 13, 1986, petitioner pled guilty before the Honorable David N. Savitt of the Court of Common Pleas of Philadelphia County to the charges of possession of an instrument of crime and the second-degree murder of Randolph Baldwin. Petitioner, who was then seventeen years old, was sentenced to life imprisonment without the possibility of parole. Petitioner did not file a motion to withdraw the guilty plea and he did not file a direct appeal.

Six months later on August 21, 1986 petitioner filed a *pro se* petition under the Pennsylvania Post Conviction Hearing Act ("PCHA"), 42 PA. CONS.STAT.ANN. § 9541, *et seq.* Through appointed counsel, petitioner eventually filed an amended petition claiming both trial court error and ineffective assistance of trial counsel. The Commonwealth moved to dismiss the amended PCHA petition. The PCHA court granted that motion on July 23, 1991. On March 30, 1992, the Superior Court affirmed the PCHA court's decision. The Supreme Court of Pennsylvania denied Allocatur on September 2, 1992.

***2** The PCHA was replaced by the PCRA in 1988. The PCRA was amended in 1995 and those amendments became effective on January 16, 1996. Act of Nov. 17, 1995, P.L. 1118 No. 32 (Spec. Sess. No. 1), § 1.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

On November 27, 1996, petitioner filed a second *pro se* application for collateral relief under the PCRA. The PCRA court appointed counsel and allowed petitioner to amend his application. Mr. Pace's second application alleged that: (1) the imposition of a life sentence without eligibility for parole was illegal; (2) the guilty plea was entered involuntarily; and (3) all counsel were ineffective, resulting in a denial of due process. (§ 2254 Pet. at 5- 5A.) On July 23, 1997, the PCRA court denied the petition on its merits. Petitioner appealed to the Superior Court of Pennsylvania.

While petitioner's appeal was pending, the Superior Court decided *Commonwealth v. Alcorn*, 703 A.2d 1054, 1057 (Pa.Sup.Ct. Dec. 17, 1997). It held, for the first time, that the 1995 amendments to the PCRA disallowed second or successive petitions filed more than one year after an underlying conviction became final, even if the conviction became final and the first petition was filed before the enactment of the 1996 amendments. *Alcorn*, 703 A.2d at 1056 (finding that "our research has indicated no prior decisions ... interpreting this section [9545(b)]; therefore, its applicability to this case presents a question of first impression").

The Commonwealth wrote a letter brief to the Superior Court concerning the pending appeal of the denial of Mr. Pace's second PCRA petition. It argued that based on *Alcorn* the petition was time-barred. The Superior Court agreed and, on December 3, 1998, it dismissed the petition as time-barred.

By motion, petitioner requested re-argument, contending there for the first time that prison officials had wrongfully destroyed legal documents, and that that conduct entitled him to an exception to the PCRA's new statute of limitations, pursuant to 42 PA. CONS.STAT.ANN. § 9545(b)(1)(i) ("the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim ..."). (Pet.'s Objs. to Magis. Rep. and Recommendation, Ex B, App. for Re-argument at 3.) On February 8, 1999, without stating reasons, the Superior Court denied the request for re-argument. Petitioner appealed to the Supreme Court of Pennsylvania. Allocatur was denied on July 29, 1999.

B. Federal Proceedings

***3** On December 24, 1999, petitioner filed this federal *habeas* petition, *pro se*. In it, he claimed that 1) neither his state trial court judge nor his attorney properly informed him that his original life sentence expressly precluded the possibility of parole, and 2) his sentence was meted out pursuant to a Pennsylvania statute which was inconsistent with other Pennsylvania statutes, in violation of the Due Process Clause of the United States Constitution. (§ 2254 Pet. at 8.)

As discussed *supra*, Magistrate Judge Angell recommended that the § 2254 petition be dismissed as time-barred. This court declined to follow the Report and Recommendation and, in an opinion dated June 7, 2001, found that Mr. Pace's petition was "properly filed" for purposes of tolling the federal *habeas* statute of limitations and that, even if it had not been properly filed, petitioner was entitled to equitable tolling while his second PCRA petition was pending.

Respondents filed a motion for reconsideration on the grounds that this court's holding is directly contrary to *Fahy v. Horn*, 240 F.3d 239 (3d Cir.2000) , which, they argue, is binding authority as to both the statutory and equitable tolling issues raised by Mr. Pace. (Resps.' Pet. at 2.) Since the June 7, 2001 order and opinion in *Pace*, there have been relevant circuit case law developments on the issue of whether a state PCRA petition, ultimately declared untimely by the state's highest court, may be "properly filed" for purposes of the federal *habeas* statute. Also, the third circuit has rendered decisions which clarify that court's position on equitable tolling. Nevertheless, while this court denies the respondents' motion for reconsideration, it grants permission for an immediate appeal because there are important legal questions involved which perhaps should most appropriately be answered by the third circuit at this stage of the proceedings.

III. Discussion

A. Standard for a Motion for Reconsideration and for Interlocutory Appeal

1. Motion for Reconsideration

Reconsideration of a judicial ruling is appropriate if (1) there has been an intervening change in controlling law; (2) there is new evidence not previously available; or (3) there is a need to correct a clear error of law or fact or to prevent a manifest injustice. *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116-117 (3d Cir.1997).

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

2. Interlocutory Appeal

The appropriate standard for an order granting permission for an interlocutory appeal is whether (1) the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

B. Mr. Pace's Second PCRA Petition Statutorily Tolled AEDPA's Statute of Limitations

1. AEDPA's Statute of Limitations

***4** A state prisoner must file his or her federal *habeas corpus* petition within one year after the completion of the state court proceedings. 28 U.S.C. § 2244(d)(1). The following section became effective on April 24, 1996, when the Antiterrorism and Effective Death Penalty Act of 1996 was signed into law:

Title 28 U.S.C. § 2244(d) provides in relevant part:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of *habeas corpus* by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; ...

(2) The time during which a properly filed application for State post- conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. 28 U.S.C. § 2244(d).

AEDPA's statute of limitations is subject to statutory and equitable tolling. *Miller*, 145 F.3d at 618. In addition, the third circuit has held that it would be impermissibly retroactive to "bar the filing of a *habeas* petition before April 23, 1997, where the prisoner's conviction became final before April 24, 1996 ..." *Burns*, 134 F.3d at 111. Mr. Pace's conviction became final in 1986. He had one year from the enactment of AEDPA, plus any additional time, for which he can show statutory or equitable tolling is appropriate, within which to file a federal *habeas* petition.

2. Pennsylvania's PCRA Statute

When petitioner filed his second PCRA petition on November 27, 1996, the Pennsylvania collateral relief statute had recently been amended. The amendments placed new time limits on PCRA petitions. The relevant part of the amended limitation subsection reads:

(b) Time for filing petition.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively. 42 PA. CONS.STAT.ANN. § 9545.

The 1995 PCRA amendments were accompanied by a Note concerning legislative intent. The Note stated that "a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under [42 PA. CONS.STAT.ANN. § 9545(b)] if the petitioner's first petition is filed within one year of the effective date of the act." Sec. 3(1) of Act 1995 (Spec. Sess. No. 1), Nov. 17, P.L. 1118, No. 32. On its face, § 9545(b) of the PCRA states that a petition must be filed within one year of the date that a petitioner's conviction becomes final, unless the petition falls within one of its enumerated exceptions, or the petitioner's conviction became final before the effective date of the amendments and the petitioner is filing a first application.

3. Pace's Second PCRA Petition was "Properly Filed" Under Federal Law

***5** The Supreme Court held in *Artuz v. Bennett*, that a state *habeas* petition is "properly filed" for purposes of § 2244(d)(2) and statutorily tolls the federal *habeas* statute

when its delivery and acceptance are in

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

compliance with the applicable laws and rules governing filing. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. 531 U.S. 4, 8, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000) (quoting *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir.1998)).

"[T]he question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." *Artuz*, 531 U.S. at 9. *Artuz* distinguishes between state statutes or statutory provisions which set forth "a condition to filing" as opposed to "a condition to obtaining relief." *Id.* at 11.

However, *Artuz* specifically left open the question "whether the existence of certain exceptions to a 'timely' filing requirement in a state collateral relief statute can prevent a late application from being considered 'improperly' filed" for federal *habeas* purposes. *Id.* at 9 n. 2. Although the third circuit has not directly answered this question, other circuits which have decided the issue have found that "if a state's rule governing the timely commencement of state post conviction relief petitions contains exceptions that require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as 'properly filed.' " Such a statute "does not impose an absolute bar to filing" and is a "condition to obtaining relief" rather than a "condition to filing." *Dictado v. Ducharme*, 244 F.3d 724, 728-29 (9th Cir.2001); *Smith v. Ward*, 209 F.3d 383, 384-85 (5th Cir.2000) (holding that a petition is "properly filed," even if eventually dismissed as untimely, when the state statute governing timely filings contains certain exceptions which require some level of judicial review); *but see Brooks v. Walls*, No. CIV.A. 01-1584, 279 F.3d 518, 2002 WL 126606, at *2 (7th Cir. Feb. 2, 2002) (holding that a "plain error exception" to a state statute's timely filing requirement does not prevent a late application from being "improperly" filed for federal *habeas* purposes). [FN1]

FN1. Pennsylvania's PCRA statute differs materially from the Illinois PCRA statute which the seventh circuit treats as a procedural filing requirement even though Illinois state court judges "cast at least a sidelong glance at the merits in order to determine whether to excuse failure to meet the deadline." *Brooks*, 279 F.3d 518, 2002 WL 126606, at *1. The Illinois PCRA statute states in relevant part:

(c) No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed or more than 45 days after the defendant files his or her brief in the appeal of the sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. 725 IL.COMP.STAT. 5/122-1(c).

The seventh circuit found that the Illinois statute "lacks the merits- related exceptions that the [AEDPA] applies to federal courts." *Brooks*, 279 F.3d 518, 2002 WL 126606, at *3. Instead, an Illinois state court may excuse a late filing if the petition demonstrates "plain error." *Id.* Conversely, the "merits-related" exceptions to the timeliness requirement in Pennsylvania's PCRA statute are virtually identical to those contained in the AEDPA. *Compare* 42 PA. CONS.STAT.ANN. § 9545(b)(1)(i)--(iii) *with* 28 U.S.C. 2244(d)(1)(B)--(D).

The seventh circuit described the approach of Illinois trial judges in evaluating untimely PCRA petitions as follows: "Thus any state prisoner whose delay was not caused by his own 'culpable negligence' (which forecloses any consideration of an untimely filing) receives either plenary review or a judicial response along the lines of 'this petition is late; and because it does not demonstrate a miscarriage of justice, I have decided not to excuse the untimeliness.' " *Brooks*, 279 F.3d 518, 2002 WL, 126606, at *1.

Although the seventh circuit has characterized its review as "non-merits based," it is respectfully suggested that as the "sidelong glance at the merits" is meant to be meaningful and not a frivolous judicial exercise, it is a "merits-based" review system. The merits are considered, however cursorily, with a deliberate eye trained to determine if the untimeliness of the petition should be excused to avoid a miscarriage of justice in a particular case.

Current third circuit precedent is entirely consistent with the approach that the ninth and fifth circuits have employed. In *Nara v. Franks*, the third circuit discussed the flexible approach that it has adopted in determining whether a state collateral petition is "properly filed" for purposes of § 2244(d)(2) and statutorily tolls AEDPA. *See Nara v. Frank*, 264 F.3d 310, 315 (3d Cir.2001). In determining that petitioner Nara's state post-conviction petition was properly filed for purposes of federal law, it applied the distinction discussed in *Artuz* between whether a state collateral petition meets the "conditions for filing" as contrasted to an inquiry as to whether the claims in the petition meet all of the "conditions for obtaining relief" under state law. *Id.* [FN2]

FN2. Petitioner Nara had filed a motion to withdraw a guilty plea *nunc pro tunc* which the third circuit noted is akin to an application for state post-conviction or other collateral review. *Id.* at 316.

Nara is consistent with its earlier decision in *Lovasz* which held that the question of whether a state court petition is "properly filed" does not depend upon the state court's ultimate ruling on the merits of the application. *Nara*, 264 F.3d at 315 (quoting *Lovasz*, 134 F.3d at 149 (a meritless PCRA petition can still constitute a "properly filed application" under § 2244(d))). *Lovasz* found that if a state allows petitioners to file second or successive petitions for post-conviction relief, federal courts should not undermine the state's decision by refusing to toll the one year period of limitation of § 2244(d)(1) while a second or successive petition is pending in the state court system. *Lovasz* stated that "[w]hile we recognize that the Pennsylvania Supreme Court has announced strict rules regarding the granting of second and subsequent petitions, Pennsylvania allows for the filing of second or subsequent PCRA petitions, and courts occasionally grant relief in such proceedings. (citations omitted)" *Lovasz*, 134 F.3d at 148-149.

*6 As discussed above, § 9545(b)(1) of the PCRA statute sets forth strict rules or conditions for obtaining relief under Pennsylvania law. However, this statute is not an absolute bar to filing a second or successive petition more than one year after a conviction became final. The statute contains exceptions that require "some level of judicial review" to examine the merits of the petition before it can be dismissed as time-barred. At the very least, a state court must examine a PCRA petition to determine whether the petition alleges any of the enumerated exceptions to the one year time-limit: (i) that the failure to raise the claim previously was the result of interference by a government official; (ii) that the facts upon which the claim is predicated were unknown to the petitioner; or (iii) that the right asserted is a newly recognized and retroactive constitutional right. 42 PA. CONS.S TAT.ANN. § 9545(b)(1).

Therefore, this court sees § 9545(b)(1) of the PCRA statute, as imposing conditions for obtaining relief and not as an absolute bar to filing a petition. *See Rosado v. Vaughn*, No. CIV.A. 00-5808, 2001 WL 1667575, at * 3 (E.D.Pa. Dec. 28, 2001) (finding that § 9545(b) "discourages late PCRA petitions by strictly limiting the availability of relief, but, given its exceptions, it does not impose an absolute bar to filing a late application: it is not a procedural filing requirement."); *Cooper v. Vaughn*, No. CIV.A. 00-6016, 2001 WL 1382492, at *3 (E.D.Pa. Nov. 6, 2001) (same). Mr. Pace's second PCRA petition was untimely under Pennsylvania law in that it was too late for him to obtain relief under Pennsylvania law, yet, the PCRA petition was "properly filed" for purposes of federal law and tolled AEDPA's statute of limitations since it complied with the relevant factors set forth in *Lovasz*. 134 F.3d at 148.

4. Fahy Does Not Preclude a Finding That Pace's Second PCRA Petition Was Properly Filed

*7 Respondents argue that *Fahy* controls the issue and requires a finding that Mr. Pace's second PCRA petition was not "properly filed." (Resp.'s Mot. at 2.) However, in a decision after *Fahy*, the third circuit specifically declined to reach the issue of whether a second PCRA petition, clearly untimely under Pennsylvania law, was necessarily not "properly filed" under § 2244(d)(2) for federal purposes. *See Banks v. Horn*, 271 F.3d 527, 534 (3d Cir.2001) [*Banks IV*] [FN3]. The third circuit stated:

FN3. There are numerous relevant and important opinions in the various *Banks* proceedings. While we designate the opinions for purposes of this opinion, they are not consistent with how other courts have numbered the various decisions. *Banks v. Horn*, 126 F.3d 206 (3d Cir.1997) [*Banks I*]; *Banks v. Horn*, 63 F.Supp.2d 525 (M.D.Pa.1999) [*Banks II*]; *Commonwealth v. Banks*, 556 Pa. 1, 726 A.2d 374 (Pa.1999) [*Banks III*]; *Banks v. Horn*, 271 F.3d 527 (3d Cir.2001) [*Banks IV*].

[w]hile we could explore this concept [whether an untimely state petition is necessarily not properly filed] under the applicable Pennsylvania law and under the federal *habeas* case law, *Artuz*, we need

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

not do so, because we conclude that, even were we to decide that the late filing of Banks's second PCRA rendered it not 'properly filed,' the District Court appropriately called on equitable principles to toll the one-year AEDPA requirement given this unusual fact pattern. (citations omitted) *Id.*

Fahy does not control an issue which the third circuit recognized had not been decided as of October 31, 2001, the date of the *Banks IV* decision.

Respondents further contend that *Fahy* stands for the proposition that an untimely PCRA petition cannot be "properly filed" under federal law. (Resps.' Mot. at 10.) Actually what *Fahy* holds is that a federal court, in determining whether a state PCRA petition was "properly filed," must interpret state law as it does when sitting in a diversity case and must defer to a state's highest court when it rules on an issue. 240 F.3d at 243-244. The *Fahy* panel observed that the Pennsylvania Supreme Court had specifically ruled that Fahy's petition *was not properly filed as a matter of state law* and that that determination by the highest state court was binding on a federal court. *Id.*

For factual and legal reasons, *Fahy* does not apply to the matter at hand. Factually, this case is materially different from *Fahy*. Here, there has not been a similar determination by Pennsylvania's highest court that Mr. Pace's second PCRA petition was improperly filed as a matter of state law. Here, the PCRA court did not dismiss Mr. Pace's second PCRA petition as time-barred when it was filed on November 27, 1996. Here, the PCRA court appointed counsel to represent Mr. Pace, gave appointed counsel an opportunity to amend the petition, and on July 23, 1997, denied the petition *on its merits*. Petitioner timely appealed to the Superior Court. While the appeal was pending, the Commonwealth sent a letter brief to the Superior Court arguing that Mr. Pace's petition should be dismissed as time-barred, based on *Alcorn*. In seeking reconsideration of the court's rejection of his petition as time-barred, petitioner made a new factual claim that squarely came within one of the exceptions to the PCRA's new statute of limitations. The Superior Court denied petitioner's request for re-argument *without stating reasons*.

The court acknowledges the argument that Mr. Pace waived his right to raise the governmental interference exception to the PCRA statute of limitations raised to the superior court because he did not make that allegation initially when he filed his second PCRA petition. 42 PA. CONS.STAT.ANN. § 9544(b) (Resp. to Petitioner's Objs. to R & R at 5.). However, given that the Pennsylvania Supreme Court had previously allowed merits review of technically defaulted claims, *see Commonwealth v. Lawson*, 519 Pa. 504, 549 A.2d 107, 111-112 (Pa.1988), Mr. Pace had a good faith basis in believing that that court would review this technically waived issue, which had fundamental constitutional dimensions.

***8** It is noticed that while *Fahy* was filed (Feb. 9, 2001) after the Supreme Court's decision in *Artuz*, (Nov. 7, 2000), the third circuit did not cite to that decision or attempt to reconcile it to the facts and circumstances of *Fahy*. Notably, subsequently, *Nara*, the most recent third circuit opinion on the issue of statutory tolling (Aug. 30, 2001), did cite and follow *Artuz*. Therefore, as a matter of precedent, *Nara*, not *Fahy*, controls disposition of this case.

Further, the *Fahy* panel relied on a ninth circuit case, *Dictado v. Ducharme*, 189 F.3d 889 (9th Cir.1999) [*Dictado I*] which was subsequently reversed by *Dictado v. Ducharme*, 244 F.3d 724 (9th Cir.2001) [*Dictado II*]. The ninth circuit reversed to make *Dictado I* consistent with *Artuz*. The third circuit had cited the *Dictado I* opinion for its language: "Had Congress intended to toll the statute of limitations for the period during which even improper applications were pending in state court, it would not have included the 'properly filed' limitation." *Fahy*, 240 F.3d at 243 (quoting *Dictado I*, 189 F.3d 889, 892 (9th Cir.1999)). This is the very language that the ninth circuit decided to disavow in light of *Artuz*. *Dictado I* was withdrawn after *Artuz* distinguished between state statutes which are "conditions to filing" as opposed to state statutes which are "conditions to obtaining relief," and left open the question whether the existence of certain exceptions to a timely filing requirement can prevent a late state post collateral petition from being considered "improperly filed." *Dictado II*, 244 F.3d 724, 727 (2001) (quoting *Artuz*, 531 U.S. at 9 n. 2). That is precisely the question now at issue in this case.

In *Dictado II*, the ninth circuit held that "if a state's rule governing the timely commencement of state post conviction relief petitions contains exceptions that require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as "properly filed." *Id.* at 727-28. Had the third circuit panel relied on *Dictado II*, an opinion consistent with *Artuz*, the panel might have reached a conclusion consistent with *Dictado II*.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

C. Pace's Second PCRA Petition Equitably Tolled AEDPA's Statute of Limitations

1. Standard For Equitable Tolling

***9** The one year "period of limitation" under 28 U.S.C. § 2244(d)(1) to file a federal *habeas corpus* petition is a statute of limitations subject to equitable tolling. *See Miller*, 145 F.3d at 618. The *Miller* opinion explained that the one year federal *habeas* statute of limitations can be equitably tolled

> only when the principle of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient." *Id.* at 618.

The *Fahy* panel enumerated three circumstances which permit equitable tolling: "(1) if the defendant has actively misled the plaintiff; (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." *Fahy*, 240 F.3d at 244 (quoting *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir.1999)).

2. Mr. Pace Has Been Prevented From Asserting His Federal Rights in an Extraordinary Way

The recent third circuit decision, *Banks IV*, is instructive for determining whether Mr. Pace has in some extraordinary way been prevented from asserting his rights. *See Banks IV*, 271 F.3d at 534. There, the court approved the district court's reasons for equitably tolling the federal statute of limitations: (1) "the state of Pennsylvania law regarding the nature of the filing requirement [42 PA. CONS.STAT.ANN. § 9545(b)] was unclear, and Banks could reasonably have viewed the state limit as a mere statute of limitations subject to equitable tolling, not, as the Pennsylvania Supreme Court, later held ..., a jurisdictional requirement" and (2) viewing the Pennsylvania Supreme Court ruling as a bar to filing a federal *habeas* petition "would result in unfair forfeiture [of petitioner's federal rights] without notice." *Id.* at 534. The court found that these factors provide "a basis for us to call on equitable principles in application of our own federal time parameters-the one year AEDPA requirement." *Id.* These fairness factors are replicated here.

a. The Uncertain Nature of the PCRA Filing Requirement

***10** *i. Statutory Language and Legislative Note*

When Mr. Pace filed his PCRA petition in November 1996, it was not known how Pennsylvania courts would interpret the amendments to the PCRA statute that had become effective on January 16, 1996 and had placed a new one year time-limit on PCRA petitions. From the language of the statute itself, it is not clear that the time-limit is jurisdictional.

The *Banks II* district court decision held that while § 9545 is captioned "[j]urisdiction and proceedings," it is not clear from the statute that all of the subsections involve jurisdiction [FN4] or that subsection (b), stating the one year time-limit and the exceptions to it, was intended to be jurisdictional in nature. *See Banks v. Horn*, 63 F.Supp.2d 525, 532-33 (M.D.Pa.1999) [*Banks II*]. The limitations subsection (b) states that a petition "shall be filed within one year of the date the judgment becomes final ..." with certain exceptions. The subsection does not use "standard jurisdictional language" that "no court will have the authority to entertain an untimely petition." *Id.* at 534. The district court in *Banks II* concluded that "it cannot be said that § 9545(b) is necessarily jurisdictional in nature, as opposed to a statute of limitations subject to equitable tolling." *Id.* This court, like the third circuit in *Banks IV*, 271 F.3d at 534, finds the reasoning of the district court in *Banks II* persuasive and determinative.

> FN4. Subsection (a) states that original jurisdiction is in the Court of Common Pleas. Section (c) limits the jurisdiction of the state courts to issue a stay of execution. Section (d) states standards governing admissibility of evidence, discovery, and privilege during and relating to an evidentiary hearing. 42 PA. CONS.STAT.ANN. § 9545. Discovery and privilege are normally not considered jurisdictional matters. *Banks II*, 63 F.Supp.2d at 533.

Since Mr. Pace's conviction occurred prior to the enactment of the PCRA amendments, it also could not have been clear how, if at all, the amendments would apply to his second PCRA petition which was filed in November, 1996. The 1995 PCRA amendments had been accompanied by a Note regarding legislative intent. The Note stated that "a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

have filed a timely petition under [42 PA. CONS.STAT.ANN. § 9545(b)] if the petitioner's first petition is filed within one year of the effective date of the act." Section 3(1) of Act 1995 (Spec. Sess. No. 1), Nov., 17, P.L. 1118, No. 32. The Note did not clarify whether petitioners with pre-1996 final convictions, who filed second or successive petitions, but who were filing their *first* petition since the amendments, had one year after its enactment within which to file a collateral relief petition.

ii. Relaxed Waiver Practice of Pennsylvania State Courts

Although Mr. Pace's case is not a death penalty case, the general practice of Pennsylvania's state courts to provide merits review to technically defaulted claims in death penalty cases ("the relaxed waiver doctrine") increased the uncertainty of the PCRA one year time-limit during the period when Mr. Pace had to decide whether to file for collateral relief in state or federal court. State courts allowed merits review for claims barred by the statutory time- limit of the amended PCRA for capital, *and in some instances non-capital cases*, if the claims alleged (1) the failure to raise the claim earlier was caused by ineffective assistance of counsel, or (2) the failure to address the merits of the claim could result in a miscarriage of justice. *See Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693, 700 (Pa.1998) (a PCRA petitioner's waiver will only be excused upon a demonstration of ineffectiveness of counsel in waiving the issue and only in a capital case); *but see Commonwealth v. Beasley*, 544 Pa. 554, 678 A.2d 773, 777 (Pa.1996) (stating that generally a second or successive post-conviction request for relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred but this showing is not required in a capital case). *Beasley* was decided on June 18, 1996, five months after the PCRA time-bar went into effect.

The third circuit itself has determined that it was not clear until *Commonwealth v. Banks*, 556 Pa. 1, 726 A.2d 374, 375-76 (Pa. Mar. 2, 1999) [*Banks III*] that the state PCRA statute of limitations was jurisdictional and not waivable, and that Pennsylvania state courts would discontinue the long-held practice of allowing merits review for claims barred by the PCRA time-bar. *See Fahy*, 240 F.3d at 245. Further, the third circuit has found that the uncertainty in the application of the relaxed waiver rule extended beyond capital cases. The third circuit stated that as of January 16, 1998, it was not clear that Pennsylvania's courts would bar merits review of a PCRA petition in a non-capital case even if that petition were untimely under the PCRA's statutory time-bar and did not meet any of the enumerated exceptions. *See Lambert v. Blackwell*, 134 F.3d 506, 521 & n. 26 (3d Cir.1998) ("... Pennsylvania courts have expressed a willingness to depart from the PCRA's stringent waiver standards, for non-capital, as well as capital cases ..."). In 1997 the third circuit stated that "it is, of course, possible in death penalty cases (and other cases as well) that future experience will show that the Pennsylvania Supreme Court consistently and regularly applies the 1995 amendments to the PCRA and thereby creates a procedural bar sufficient to satisfy the standard of *Johnson v. Mississippi*. That time, however, has not yet been reached." *Banks v. Horn*, 126 F.3d 206, 214 n. 3 (3d Cir.1997) [*Banks I*].

b. Treating Mr. Pace's Second PCRA Petition As Untimely And a Bar to Filing a Federal Habeas Petition Would Result in Unfair Forfeiture Without Notice

***11** It was not until the Pennsylvania Supreme Court decided *Banks III* in 1999 that it was sufficiently clear for federal review purposes that § 9545(b)(1) was jurisdictional and could operate as a bar to federal *habeas* review. *Fahy*, 240 F.3d at 245; *Banks IV*, 271 F.3d at 534. In *Banks IV*, the court noted that viewing the Pennsylvania Supreme Court's 1999 decision as a jurisdictional bar to a petitioner filing a pre-1999 federal *habeas* petition "would result in unfair forfeiture without notice." *Banks IV*, 271 F.3d at 534. Similarly, barring Mr. Pace from filing his pre-1999 federal *habeas* petition would result in forfeiture of his federal rights without notice. Mr. Pace could not, for federal *habeas* purposes, be said to have had knowledge that the PCRA time-limit was jurisdictional on April 23, 1997, the date that he would have had to file in federal court to protect his federal rights.

Pace's second PCRA petition, filed on November 27, 1996, alleged that: (1) the imposition of a life sentence without eligibility for parole was illegal; (2) his guilty plea was entered involuntarily; and (3) that all counsel were ineffective, resulting in a denial of due process. (§ 2254 Pet. at 8.) Mr. Pace's second PCRA petition alleged claims that traditionally had overcome the PCRA statutory time-bar. On July 23, 1997, the PCRA court denied Mr. Pace's petition on the merits, giving him no notice that his petition was jurisdictionally time-barred. Although the Superior Court dismissed the second PCRA petition as time-barred, Mr. Pace still had no absolute notice that that ruling meant the time-limit was jurisdictional and not waivable due to the nature of the claims that he raised to that court. When on March 2, 1999 Pennsylvania made it clear that the PCRA time-limit was jurisdictional, Mr. Pace had a motion pending before the Pennsylvania Supreme Court requesting Allocatur from the denial for the motion for re-argument by the Superior Court, discussed *supra*. That motion for re-argument had invoked one of the statutory exceptions to the PCRA time-bar, that is, "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim ..." 42 PA. CONS.STAT.ANN. § 9545(b)(i). Mr. Pace, therefore, had no timely notice, while his second PCRA petition was in the state court system, that his failure to file a *habeas* petition in federal court would deny him his right to federal review.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

3. Mr. Pace Exercised Reasonable Diligence in Bringing His Claims

a. Pace Would Not Have Been Allowed to File His Petition in Federal Court At The Time Respondents Contend He Would Have Had To In Order To Protect His Federal Rights

***12** Mr. Pace would not have been allowed to proceed on a petition in federal court within the one year AEDPA statute of limitations because the federal courts in this district would have refused to hear his federal claims because he had failed to exhaust his remedies in state court. Mr. Pace filed his second PCRA petition in November 1996. As of September 1997, the third circuit stated that it was still not clear how Pennsylvania courts would interpret amendments to the PCRA and that federal courts should not hear petitions that were not brought in state court simply because they were thought to be excluded by the 1995 amendments to the PCRA. *See Banks I*, 126 F.3d at 211-14; *see also Hammock v. Vaughn*, No. CIV.A. 96-3463, 1998 WL 163194, at * 6 (E.D.Pa. April 7, 1998) ("There is thus a lack of certainty with respect to state application of [the 1995 PCRA amendments]. This lack of certainty requires dismissal /of the petition."); *Peterson v. Brennan*, No. CIV.A. 97-2477, 1998 WL 470139, at *6 (E.D.Pa. Aug. 11, 1998) (same). Only recently have the state courts interpreted the 1995 amendments to the PCRA conclusively enough that federal courts do not have to dismiss federal *habeas* petitions for failure to exhaust state remedies. *See Lines v. Larkins*, 208 F.3d 153, 164 (3d Cir.2000) ("It is now clear that the one year limitation applies to all PCRA petitions including a second petition, no matter when the first was filed."); *Holman v. Gillis*, 58 F.Supp. 587, 594-96 (July 21, 1999) (finding that the ambiguity relating to whether the one year statute of limitations is a procedural bar to all untimely PCRA petitions that do not qualify for the enumerated exceptions was only remedied in December 1998).

The third circuit stated in *Fahy*:

> When the state law is unclear regarding the operation of a procedural filing requirement, the petitioner filed in state court because of his or her reasonable belief that a § 2254 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations during the pendency of the state petition up to the highest reviewing court." 240 F.3d at 245.

It was objectively reasonable for Mr. Pace to believe that if he filed a § 2254 petition at the time he filed his second PCRA petition, the federal petition would have been dismissed without prejudice as unexhausted. There has been no abuse of process by Mr. Pace and he has diligently and reasonably asserted his claims. *See Fahy*, 240 F.3d at 244.

This court equitably tolls AEDPA's statute of limitations while petitioner's second PCRA petition was pending from November 27, 1996 until July 29, 1999, because Mr. Pace meets the relevant factors discussed in *Miller*, *Jones*, *Fahy*, and *Banks IV*. In an "extraordinary way," the confluence of the following factors caused the petitioner to be prevented from asserting his federal rights: (1) the uncertainty of Pennsylvania law at the time that Mr. Pace had to choose whether to file a state or federal *habeas* petition; (2) lack of notice of forfeiture to Mr. Pace of his right to federal review of his conviction and sentence; (3) the fact that Mr. Pace would not have been allowed to proceed in federal court at the time he would have been required to file his federal *habeas* petition in order to preserve his federal rights; (4) Mr. Pace has diligently and reasonably asserted his claims; and (5) Mr. Pace's sentence is life without the possibility of parole.

4. Fahy Does Not Preclude a Finding that Petitioner's Second PCRA Petition Equitably Tolled the AEDPA Statute of Limitations

***13** *Fahy* held that equitable tolling was appropriate in a capital case even where extraordinary circumstances were not established. 240 F.3d at 245. Respondents argue that *Fahy* stands for the

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

proposition that uncertainty in Pennsylvania law cannot constitute extraordinary circumstances. (Resps.' Mot. at 18.) Extraordinary circumstances exist in this case, not based solely on the uncertainty of Pennsylvania law, but also on the unusual confluence of factors that left Mr. Pace, who is serving life in prison without the possibility of parole, without notice of the forfeiture of his federal rights.

Petitioner's sentence, life without the possibility of parole, was imposed when he was only seventeen years old. In applying equitable tolling in a capital case, the third circuit stated, "[i]n a capital case such as this, the consequences of error are terminal, and we therefore pay particular attention to whether principles of 'equity would make rigid application of a limitation period unfair.' " *Fahy v. Horn*, 240 F.3d at 245 (citing *Miller*, 145 F.3d at 618). The *Fahy* court went on to state, "[w]e elect to exercise leniency under the facts of this capital case where there is no evidence of abuse of process." *Fahy*, 240 F.3d at 245. Mr. Pace's case calls for leniency too because the consequences facing him, the certainty of spending the rest of his life in prison, are extremely grave. [FN5] Should the court not toll AEDPA's statute of limitations, petitioner will have to spend the rest of his life in prison without being allowed federal review to correct what could be serious deprivations of federally protected constitutional rights. Accordingly, this court finds AEDPA's one year statute of limitations was equitably tolled while petitioner's second PCRA petition was pending.

FN5. The Supreme Court has recognized the special gravity of life without the possibility of parole, noting that the sentence "is far more severe" than a life sentence and that only "capital punishment ... exceeds it." *Solem v. Helm*, 463 U.S. 277, 297, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

IV. Conclusion

***14** This court finds that petitioner was entitled to statutory tolling and equitable tolling while his second PCRA petition was pending. Because petitioner's conviction became final before the enactment of AEDPA, he had one year from April 24, 1996, plus the period in which the statute statutorily or equitably tolled, to file his federal *habeas* petition. *See Burns*, 134 F.3d at 111.

The federal statute of limitations ran from April 24, 1996 to November 26, 1996 (the day before petitioner filed his second PCRA petition) and from July 30, 1999 (the day after the Pennsylvania Supreme Court declined to review the Pennsylvania Superior Court denial of his PCRA petition) until late December, 1999 when petitioner filed his federal *habeas* petition. Given the one year statute of limitations, petitioner had until December 24, 1999 to file his federal *habeas* petition. Petitioner dated his federal *habeas* petition December 22, 1999. The Clerk of Court marked petitioner's *habeas* petition as filed on December 27, 1999. The prison mailbox rule states that the petition is deemed filed when a prisoner gives his petition to prison officials. *See Burns*, 134 F.3d at 113. Since the Commonwealth does not argue otherwise, this court assumes petitioner gave his petition to prison officials by December 24, 1999 making his federal *habeas* petition timely filed.

For the reasons discussed above, the motion for reconsideration is denied. This opinion reaches the same conclusions on statutory and equitable tolling as previously stated in the June 7, 2001 opinion. However, it supercedes the previous opinion to reflect the Supreme Court's decision in *Artuz* and other relevant cases subsequently decided.

The respondents' motion for permission for immediate appeal is granted on the following issues since they involve controlling questions of law as to which there are substantial grounds for difference of opinion and an immediate appeal from this opinion and order may materially advance the earliest efficient resolution of the litigation. The questions of law are

1. Do the enumerated exceptions to Pennsylvania's PCRA statute of limitations, 42 PA. CONS.STAT.ANN. § 9545(b)(1), prevent a late state post collateral petition from being necessarily "improperly filed" for purposes of 28 U.S.C. § 2244(d)(2)?
2. Does the confluence of the following factors constitute "extraordinary circumstances" for purposes of equitably tolling AEDPA's one year statute of limitations: (1) the uncertainty of Pennsylvania law at the time that petitioner had to choose whether to file a state or federal *habeas* petition; (2) the lack of notice of forfeiture to petitioner of his right to federal review of his conviction and sentence; (3) the fact that petitioner would not have been allowed to proceed in federal court at the time he would have been required to file his federal *habeas* petition in order to preserve his federal rights; (4) and petitioner's sentence is life without the possibility of parole?

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

The court stays review of the substantive merits pending outcome of the appeal.

***15** An appropriate order follows.

ORDER

AND NOW, this ___ day of March 2002, upon consideration of Respondents' Motion for Reconsideration, or in the Alternative for Permission to Appeal, Docket # 20, and the responses thereto, it is hereby ORDERED that Respondent's Motion, is DENIED in part and GRANTED in part. The motion for reconsideration is denied and the motion for an immediate appeal is granted.

The court certifies that this order involves controlling questions of law on which there are substantial grounds for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

In finding petitioner's federal *habeas* petition was timely filed, this Court decided two questions of controlling law:

1. Do the enumerated exceptions to Pennsylvania's PCRA statute of limitations, 42 PA. CONS.STAT.ANN. § 9545(b)(1), prevent a late state post collateral petition from being necessarily "improperly filed" for purposes of 28 U.S.C. § 2244(d)(2)?
2. Does the confluence of the following factors constitute "extraordinary circumstances" for purposes of equitably tolling AEDPA's one year statute of limitations: (1) the uncertainty of Pennsylvania law at the time that petitioner had to choose whether to file a state or federal *habeas* petition; (2) the lack of notice of forfeiture to petitioner of his right to federal review of his conviction and sentence; (3) the fact that petitioner would not have been allowed to proceed in federal court at the time he would have been required to file his federal *habeas* petition in order to preserve his federal rights; (4) and petitioner's sentence is life without the possibility of parole?

Answers to these questions will determine whether consideration of the substantive issues raised in the petition is appropriate.

Proceedings are stayed in the district court pending the action by the court of appeals on this certification.

2002 WL 485689 (E.D.Pa.)

END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 31, 2003

Mr. Billy H. Nolas
Defender Association of Philadelphia
The Curtis Center, Suite 545-West
Independence Square West
Philadelphia, PA 19106

Re: John A. Pace
v. Donald Vaughn, et al.
Application No. 03A540

Dear Mr. Nolas:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on December 31, 2003 extended the time to and including March 4, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by

Ruth Jones
Case Analyst